Calendar No. 3

101st Congress
1st Session

SENATE

Report
101-1

PROCEDURE FOR THE IMPEACHMENT TRIAL OF U.S. DISTRICT JUDGE ALCEE L. HASTINGS IN THE UNITED STATES SENATE

REPORT

OF THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

TO ACCOMPANY

S. Res. 38

TO PROVIDE FOR THE APPOINTMENT OF A COMMITTEE TO RECEIVE AND TO REPORT EVIDENCE WITH RESPECT TO ARTICLES OF IMPEACHMENT AGAINST JUDGE ALCEE L. HASTINGS

AND

S. Res. 39

TO PROVIDE FOR THE FILING AND ARGUMENT OF MOTIONS BY JUDGE ALCEE L. HASTINGS TO DISMISS ARTICLES OF IMPEACHMENT

February 2 (legislative day, January 3), 1989.—Ordered to be printed

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★(Star Print)
29-010

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1989

S683-1

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PROVIDING FOR THE APPOINTMENT OF A COMMITTEE TO RECEIVE AND TO REPORT EVIDENCE WITH RESPECT TO ARTICLES OF IMPEACHMENT AGAINST JUDGE ALCEE L. HASTINGS AND PROVIDING FOR THE FILING AND ARGUMENT OF MOTIONS BY JUDGE ALCEE L. HASTINGS TO DISMISS ARTICLES OF IMPEACHMENT

February 2 (legislative day, January 3), 1989.—Ordered to be printed

Mr. Ford, from the Committee on Rules and Administration, submitted the following

REPORT

[To accompany S. Res. 38 and S. Res. 39]

The Committee on Rules and Administration reports two original resolutions; one to provide for the filing and argument of motions by Judge Alcee L. Hastings to dismiss articles of impeachment; and, if all articles are not dismissed, one to provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Judge Alcee L. Hastings; and recommends that both resolutions be agreed to.

Purpose

The Committee on Rules and Administration, directed by S. Res. 480, 100th Congress, 2d Session,[1] to conduct a hearing during the week of January 23, 1989, and to report to the Senate on or about February 1, 1989, its advice regarding specified procedural matters in the Senate impeachment trial of United States District Judge Alcee L. Hastings, reports thereon with recommendations.

The procedural matters about which the Committee was directed to advise the Senate are: "(a) the appropriate use of Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials in the impeachment of Judge Alcee L. Hastings; and (b) any other matter which may assist the Senate in a fair trial of the pending impeachment."

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[1] See Appendix A for text of S. Res. 480, 100th Congress, 2d Session.

I. INTRODUCTION

In preparing this report, the Committee reviewed precedents of the House of Lords, the United States Senate and the writings of authorities on the subject of impeachment in both England and the United States. In addition, the Committee requested the parties, United States District Judge Alcee L. Hastings and the Managers on behalf of the House of Representatives (the "House Managers"), as well as the Congressional Research Service of the Library of Congress, to comment on the procedural matters. Each party was then permitted to submit additional comments in response to those made by the other, and also on particular subjects requested by the Committee. The comments of the parties, their responsive statements, and those of the Congressional Research Service are included in this report [2] along with a statement by Senator Charles McC. Mathias, Jr., who was Chairman of the committee appointed in the impeachment of Judge Claiborne.

Additional statements were received from the parties in response to the Committee's request which was set forth in its letter inviting them to testify before the Committee on January 24, 1989 (later postponed until January 26, 1989). Those statements and their hearing testimony are also included in this report.

After careful consideration of the foregoing, and the testimony of the parties during the January 26, 1989 hearing, the Committee finds, and advises the Senate, that the Senate has clear authority to appoint, pursuant to Senate Impeachment Rule XI, a committee to perform the duties and to exercise the powers provided for in the rule. The Committee recommends that such a committee be appointed in the pending impeachment of U.S. District Court Judge Alcee L. Hastings. It is recommended, however, that the Senate set a date for hearing the parties and deciding any motion to dismiss that does not require the taking of evidence before appointing such a committee.

With regard to the impeachment committee, the Committee further recommends that it consist of twelve Members, that the Majority Leader and Minority Leader each recommend six Members for service on the committee, that it shall be deemed a standing committee of the Senate for purposes of reporting resolutions and printing, that its chairman be authorized to waive the requirements of Impeachment Rule XIX requiring all questions be in writing and asked by the chairman, and that it be authorized to prepare a statement of uncontested facts and a summary of evidence on contested issues of fact.

To assist the Senate in providing a fair trial in this case, the Committee recommends that the impeachment committee's public proceedings be televised to Senate offices and videotaped. Such videotapes should be made available to Members for review, with ample time provided between the impeachment committee's proceedings and the Senate trial to permit Members reasonable time to do so.

Both parties requested that the Committee make other recommendations relating to the evidence and the trial, such as establishing a pretrial discovery procedure, changes in the Senate schedule, rules of evidence, the authority of the impeachment committee to decide evidentiary questions, Senate payment of counsel fees, and Senate discretion under Rule XI to hear selected witnesses. The Committee has reviewed these matters and finds that they are matters that should be left, without recommendation, to the discretion of the impeachment committee or the Senate.

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[2] The Committee has taken the liberty of separating their statements by subject and including the individual sections in this report at the appropriate place.

II. Background of the Impeachment of Judge Alcee L. Hastings

A. PROCEEDINGS IN THE CONGRESS

On August 3, 1988, the House of Representatives voted to impeach Judge Alcee L. Hastings, adopted articles of impeachment and appointed the House Managers. The Senate received from the House of Representatives on August 8, 1988, its message advising the Senate of the foregoing and, on that same day, adopted an order informing the House that it would be ready on August 9, 1988, to receive the House Managers to present the articles of impeachment.

On that date, the Senate received the House Managers, who presented to the Senate seventeen articles of impeachment against Judge Alcee L. Hastings and demanded that the Senate prepare for the impeachment trial. Following the presentation of the articles by the House Managers, the Senate proceeded with the swearing of its Members and the adoption of S. Res. 456, authorizing the issuance of a summons to Judge Alcee L. Hastings. In that resolution Judge Alcee L. Hastings was ordered to file an answer to the articles of impeachment no later than September 8, 1988, and the House Managers were allowed to file a replication no later than September 23, 1988. The final action taken by the Senate that date with regard to the impeachment was the adoption of the order directing this Committee to report to the Senate by September 23, 1988, "on (a) the authority of the Senate to continue in the next Congress proceedings on the impeachment of Judge Alcee L. Hastings; (b) the appropriate use, in the pending impeachment, of Senate Impeachment Rule XI; and (c) any other matter which may assist the Senate in a fair trial of the pending impeachment."

On September 22, 1988, the report of the Rules Committee was submitted.[3] That same day, S. Res. 480 was reported by Senator Ford. That resolution called for the impeachment proceedings to be carried over to the next Congress and for further consideration by the Rules committee of two questions: the appropriate use of Senate Impeachment Rule XI, which permits a committee to receive evidence in impeachment proceedings, and on the issue of procedures to assure a fair trial. The Rules Committee was directed to report its recommendations on or about February 1, 1989.

S. Res. 480 also required the parties to be prepared by March 1, 1989, or as soon thereafter as the Senate might determine, to present their evidence in the forum the Senate might designate. Counsel for the parties were requested to work together on stipulations as to evidentiary matters not in dispute and as to documents, and jointly report by February 20, 1989, as to stipulations and other matters counsel agree may facilitate the resolution of the impeachment.

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[3] Senate report 100-542, 100th Congress, 2d Session.

Senate Legal Counsel was directed to work with the parties to amicably resolve disputes as to stipulations and other matters concerning preparation for the trial. S. Res. 480 was adopted by unanimous consent on September 30, 1988.

On December 12, 1988, the Chairman and Minority Ranking Member of this Committee sent a letter[4] to the parties requesting that they testify on the matters referred to the Committee by S. Res. 480 and invited them to update and supplement their previous statements regarding those issues. To provide information to assist the Committee in its consideration of recommendations regarding the conduct of this trial, they requested updated information regarding the witnesses each party expected to call and requested that each party provide the Committee with any motions they intended to file that would be dispositive of any Article without the taking of evidence. Judge Hastings' counsel advised the Committee that he intended to file such motions, but did not provide them to the Committee.

The Committee has been advised by the Senate Legal Counsel that the parties have agreed that respondent's motions and briefs will be filed by February 10, 1989, the House will file responsive briefs by February 24, 1989, and the respondent will have until March 3, 1989 to file a rebuttal brief.

In accordance with S. Res. 480, the Committee held a hearing on January 26, 1989. Testimony was received from the House Managers and Judge Hastings concerning the propriety of using an impeachment committee to receive evidence in the instant case and on procedures to ensure a fair trial.[5]

B. FACTS ON THE CASE[6]

On December 29, 1981, a grand jury sitting in the Southern District of Florida returned indictments charging Judge Alcee L. Hastings and William A. Borders, Jr., an attorney, with conspiracy and obstruction of justice. After separate trials, Mr. Borders, on March 29, 1982, was convicted on all counts by a jury; and on February 4, 1983, Judge Hastings was acquitted by a jury. On March 17, 1983, a complaint was filed with the United States Court of Appeals for the Eleventh Circuit by William Terrell Hodges, Chief Judge of the United States District Court for the Middle District of Florida, and Anthony A. Alaimo, Chief Judge of the United States District Court for the Southern District of Georgia, alleging misconduct on the part of Judge Hastings. The complaint was initiated under 28 U.S.C. 372(c), the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.

An Investigating Committee consisting of five judges was appointed by the Chief Judge of the Eleventh Circuit and spent approximately three years investigating the allegations, hearing over 100 witnesses and receiving approximately 2,800 exhibits. The Judicial Council of the Eleventh Circuit accepted and approved the unanimous Investigating Committee Report and concluded that Judge Hastings had engaged in conduct which might constitute grounds for impeachment. A certification to that effect was made to the Judicial Conference of the United States on September 2, 1986, which concurred that impeachment may be warranted.

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[4] See Appendix G for text of December 12, 1988 letter to the parties from the Committee on Rules and Administration.

[5] See Appendix H and I for text of testimony submitted by each party.

[6] The portions of the summary concerning events prior to receipt of the message from the House of Representatives on August 8, 1988, are based on the Report of the Committee on the Judiciary, entitled "Impeachment of Judge Alcee L. Hastings", Report 100-810, 100th Congress.

On March 17, 1987, Chief Justice Rehnquist, acting on behalf of the Judicial Conference, transmitted to the Speaker of the House of Representatives a certification that the Judicial Conference had determined that Judge Hastings had "engaged in conduct which might constitute one or more grounds for impeachment." That certification and the Investigating Committee's Report were referred to the Committee on the Judiciary, which in turn referred the matter to the Subcommittee on Criminal Justice.

The Subcommittee held seven days of hearings from May 18, 1988, to June 9, 1988, during which it heard the testimony of twelve witnesses. Judge Hastings was invited to testify, but declined to do so on advice of counsel. Mr. Borders was subpoenaed to testify but refused to do so, asserting various constitutional rights. The Subcommittee decided not to seek immunity and compel Mr. Borders to testify, citing as reasons for this decision Mr. Borders' recalcitrance, the significant delay that would likely result from pursuing his testimony, and the question of his credibility. On July 7, 1988, the Subcommittee unanimously adopted 17 articles of impeachment, introduced as H. Res. 499, which was taken up by the Committee on the Judiciary on July 26, 1988, and adopted, after adoption of a technical and clarifying amendment.

III. THE APPROPRIATE USE OF RULE XI OF THE RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS IN THE IMPEACHMENT OF JUDGE ALCEE L. HASTINGS

(A) INTRODUCTION

Rule XI of the Senate Impeachment Rules provides as follows:

> XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.
>
> Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and

given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

(B) HISTORICAL BACKGROUND AND PRECEDENTS

(1) British practice

The House of Lords has used committees to take evidence in impeachment cases. In the 1620 trial of Francis Bacon, the Lords ". . . appointed a select Committee of themselves, to take Examination of Witnesses to the Briberies and Corruptions of the Lord Chancellor. . ." [7] A committee was used to take testimony in the trial of the Bishop of Landaff, who was accused with Bacon.[8] A committee also took testimony in the 1624 impeachment of the Lord Treasurer Middlesex.[9] The trials of Bacon and Middlesex are also discussed in Foster, *The House of Lords 1603–1649, Structure, Procedure, and the Nature of Its Business,* pp. 155–157 (University of North Carolina Press, 1983).

(2) United States practice

(a) In General.—Although there is no mention of committees in the discussion of impeachments found in the *Federalist Papers,* it cannot be doubted that the founders were aware of the British practice. Jefferson's *Manual,* at § 614, includes the following remarks concerning Parliament's procedure:

> WITNESSES. The practice is to swear the witnesses in open House, and then examine them there; or a committee may be named, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand.[10]

(b) Senate precedents.—Committees have been used by the Senate from the time of the earliest impeachment trials. In the 1803 impeachment of Judge Pickering a committee was appointed to search precedents.[11] A similar procedure was used when the Senate named a committee to consider how to proceed in the 1830 case of Judge Peck.[12]

(c) Impeachment committee rule first propounded.—On March 25, 1904, Senator Hoar of Massachusetts proposed a resolution directing the Rules Committee to report on whether the impeachment rules, ". . . may properly and lawfully provide for taking testimony in such cases by a committee in accordance with the practice of

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[7] *State Trials,* Vol. 2, 1101.
[8] *Id.,* 1116.
[9] *Id.,* 1197.
[10] Rules of the House of Representatives, H. Doc. 99–279, at 299.
[11] *Senate Journal,* 332 (Jan. 3, 1804).
[12] See *Hinds' Precedents,* Vol. 3, § 2367.

the English House of Lords in such cases, questions of the admission of material testimony and the final argument being reserved for the full Senate." [13]

Senator Sutherland made a similar proposal on December 16, 1912. His resolution was directed to the Judiciary Committee and would not have applied to an impeachment of the President, Vice President, cabinet members or a member of the Supreme Court. The resolution was prompted by the length of a case the Senate was then trying (Judge Archbald's case) and by the fact that many Senators could not be present to hear the testimony.[14]

(d) Impeachment committee rule adopted.—On May 24, 1934, Senator Ashhurst proposed a resolution to permit the appointment of a committee of 12 to take evidence in impeachment cases.[15] On May 28, 1935, S. Res. 18, which authorized the use of committees to receive evidence, was adopted.[16] The resolution became Rule XI of the Senate Impeachment Rules.

(C) USE OF RULE XI IN JUDGE CLAIBORNE'S TRIAL

(1) The impeachment committee role.—The present rule pertaining to the appointment of a committee in impeachment cases in the Senate was first used in 1986. On August 14, 1986, during the impeachment proceedings of Judge Harry E. Claiborne, the Senate adopted S. Res. 481 [17] which called for the appointment of a committee pursuant to Rule XI. The Vice President appointed twelve Members to the panel, six recommended by the Majority Leader and six recommended by the Minority Leader. The committee organized and elected as chairman Senator Charles McC. Mathias, Jr. Members of the staff of the Committee on Rules and Administration provided staff assistance to the impeachment committee, and the Senate Legal Counsel served as its counsel.

The committee was authorized, under S. Res. 481, to "perform the duties and to exercise the powers provided for" in Impeachment Rule XI. The committee's report (Report 99-511, reprinted in S. Doc. 99-48 at pp. 21-24), shows that it viewed its role under Rule XI as limited. It noted that Rule XI did not authorize the committee to make recommendations and it made none. Questions that were beyond its jurisdiction were referred to the full Senate.

The committee decided motions pertaining to the type and scope of evidence that would be heard. These included motions to accept, as substantive evidence, certain testimony and exhibits from Judge Claiborne's second trial and admissions by Judge Claiborne at his first and second trials, a motion to exclude evidence as irrelevant and a motion by Judge Claiborne for discovery.

Several motions were found to be beyond the jurisdiction of the committee and were referred to the full Senate. For example, the House moved for summary disposition of one article of impeachment or, in the alternative, that the Senate apply collateral estoppel to specific issues alleged in other articles. Similarly, Judge Claiborne submitted motions on which the committee lacked authority to rule, such as his motion to declare Senate Impeachment Rule XI unconstitutional and his motion requesting that the Senate designate that the standard of proof in an impeachment trial is proof beyond a reasonable doubt.

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[13] See *Hinds' Precedents*, Vol. 3, § 2217; 58th Cong. 2nd Session, *Record*, 3660.
[14] See 49 *Cong. Record*, 698-699.
[15] 78 *Cong. Record*, 9431.
[16] 79 Cong. Record, 8309-8310.
[17] See Appendix D for full text of S. Res. 481.

The committee also referred to the Senate a suggestion from several Senators that the Senate might benefit from the services of an expert on the subject of legal principles and procedures governing prosecutorial decisions customarily followed by the IRS and the Department of Justice.

In addition to ruling on motions within its jurisdiction, the committee heard witnesses and received evidence, including documents relating to proceedings in the courts concerning Judge Claiborne, a certified transcript of Judge Claiborne's second trial, and exhibits from the parties.

Seven days of hearings were held by the committee, from September 15 to September 23, 1986. Testimony was heard from three witnesses called by the House Managers and from sixteen witnesses called by Judge Claiborne. All witnesses were subject to cross-examination. The committee called no witnesses of its own but did recall one witness for further examination. The chairman and members of the committee also submitted questions.

(2) Role of full Senate.—The Senate received the report of the Rule XI committee and the transcript of the proceedings and testimony given before the committee. It also received briefs and memoranda from the parties and numerous motions from Judge Claiborne. The Senate heard argument on motions and on the case but did not receive any evidence in addition to that heard by the Rule XI committee.

The trial of Judge Claiborne in the Senate began on October 7, 1986, and was concluded two days later, on October 9. At the trial, the Senate heard arguments on the Judge's motion for a postponement of the trial until after the courts had decided a post-conviction motion he had filed. The Senate also heard arguments on his motions to declare Rule XI unconstitutional and to designate, as the standard of proof in an impeachment trial, proof beyond a reasonable doubt.

By voice vote, the Senate adopted a motion by Senators Heflin and Warner to postpone decisions on all motions except the judge's first motion to postpone, until after the presentations of the parties. Judge Claiborne's postponement motion was denied by voice vote. By rollcall vote, the Senate defeated the motion to adopt the reasonable doubt standard.

The Senate voted in favor of Senator Dole's motion not to hear any additional witnesses in the case. Senator Dole explained that the motion was to determine whether to "reopen and have a trial or not have a trial." By its vote, the Senate recognized the validity of Rule XI and the rationale upon which it is based. Although the Senate elected not to hear any evidence, the full Senate did hear closing arguments by the House Managers, Judge Claiborne, and by his counsel. Pursuant to a unanimous consent agreement, on October 9, 1986, the Senate voted on each of the articles of impeachment and entered its judgment in the case.

(D) STATEMENT OF CHAIRMAN CHARLES McC. MATHIAS, JR.

After the Senate concluded its trial, the chairman of the impeachment committee made a statement in the Senate concerning, among other matters, the use of the impeachment committee pursuant to Rule XI. The portion of his statement pertaining to the use of an impeachment committee follows:

> Members are now thoroughly familiar with the provisions of Senate impeachment rule XI. The rule authorizes the Presiding Officer to appoint, if the Senate so orders, a committee to take testimony in impeachment proceedings. Upon the committee's report to the Senate of a certified transcript of its proceedings, the testimonial and documentary evidence received by the committee is to be considered, to all intents and purposes, as having been received and taken before the Senate. The rule reserves to the Senate the right to determine the competency, relevancy, and materiality of this evidence. The rule also preserves the right of the Senate to send for any witness and hear that witness' testimony in open Senate, or by order of the Senate to have the entire trial in open Senate.
>
> What may be less familiar to the Senate is the fact, which is demonstrated by rule XI's English antecedents and the Senate's prior impeachment experiences, that it is not novel for Senators to base their judgments in an impeachment trail on a written record of previously recorded testimony.
>
> #### THE ENGLISH ANTECEDENTS
>
> In 1916, in support of a proposal that the Senate consider alternatives to the taking of evidence in open Senate Alexander Simpson, who had been one of Judge Robert Archbald's counsel at an impeachment trial several years earlier, cited as authority a passage in "Jefferson's Manual of Parliamentary Practice." See A. Simpson, "A Treatise on Federal Impeachments" 68. Jefferson had prepared the manual, for his guidance as President of the Senate during his Vice Presidency from 1797 to 1801. On the subject of witnesses at impeachment trials, Jefferson, reflecting on English impeachment practice, wrote that:
>
> "The practice is to swear the witnesses in open House, and then examine them there; or a committee may be named, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand."
>
> Constitution, Jefferson's Manual, and Rules of the House of Representatives," (H.R. Doc. No. 277, 98th Cong., 2d Sess., § 614, at 296 (1985)).
>
> While the choice of impeachment procedures cannot be left exclusively to a study of English practice, the evidence appears to be that, at least for a period of time, committees were used in the House of Lords during the trials of impeachments. In 1620, for example, the House of Lords

"appointed a select Committee of themselves, to take Examination of Witnesses" in the trial of Sir Francis Bacon. 2 T. Howell, "A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783" (1101 (1816)). The same year the House of Lords appointed a committee to examine witnesses in the trial of Dr. Theophilus Field, Bishop of Landaff. (Id. at 1116.) In 1621, the House of Lords examined witnesses in committee in the trial of Sir Giles Mompesson. (Id. at 1122–24.) Then, in 1624, depositions taken by a committee were read to the House as evidence of impeachment charges against Lord Treasurer Middlesex. (Id. at 1183; 3 H.L. Jour. 350, 352–61, 365.)

I have in my office several volumes of these reports of State Trials which came from an old Maryland law library where I believe they had been since before the Revolution. The Constitutional language "high crimes and misdemeanors" suggests that the Founders were familiar with these reports and presumably with the established practice of employing committees to take impeachment evidence.

The use of committees during impeachment trials in the House of Lords is documented in an article by Prof. Napoleon Williams, which he wrote in response to a brief suggestion to the contrary by Professor Berger. I ask unanimous consent that an excerpt from Professor Williams' article, "The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials," (50 N.Y.U.L. Rev. 512, 528–32 (1975)), be reprinted as an addendum to my statement today.

These English precedents indicate that, in utilizing Impeachment Rule XI, the Senate is not writing on a blank slate.

THE HISTORY OF RULE XI

While the Claiborne impeachment was the first Senate impeachment trial in which witnesses were examined before a committee and not on the Senate floor, rule XI is not a departure of the practice of receiving evidence through a printed record.

The initial suggestion that a Senate committee receive impeachment evidence was made in 1904 after the House had initiated an investigation of District Judge Charles Swayne. Senator George Hoar proposed an addition to the Senate's impeachment rules to require the Presiding Officer (except in an impeachment of the President or Vice President) to appoint a committee:

"To take all the testimony on both sides . . . [and] cause all the testimony by them heard to be reduced to writing and reported to the full Senate." (38 Cong. Rec. 3902 (1904)).

The resolution was referred to the Committee on Rules which took no action on it, and the Swayne impeachment trial proceeded in 1905 without the use of a committee.

The suggestion for a committee was renewed in 1912 during the impeachment trial of Circuit Judge Robert Archbald. Senator (later Justice) George Sutherland introduced a resolution to amend the impeachment rules to provide that in all subsequent impeachments, except when the President, the Vice President, a Cabinet member, or a Justice of the Supreme Court is being tried, testimony may be taken by the Judiciary Committee and reported to the Senate. Senator Sutherland compared this procedure to the "reference, in the case of a court of equity, to a master, and in the case of the Senate by reference to a special committee or to a standing committee." (49 Congressional Record 698 (1912).)

In the remarks to the Senate, Senator Sutherland paid special attention to the reality that at impeachment trials many Senators learn of all or portions of testimony through a written record rather than by direct observation of witnesses. He noted that because of other business of the Senate, "[m]any of the Senators could not be present to hear the testimony . . ." Consequently, for those Senators, "[o]f necessity they are obliged to read [the testimony] before they can act. The same result, it seems to me, would be obtained to referring the case in the first instance to the Judiciary Committee to take the testimony and report it to the Senate."

The Senate did not act on Senator Sutherland's suggestion, but his idea and the idea enunciated earlier by Senator Hoar persisted. Several years after the Archbald impeachment, Alexander Simpson, who, as I have indicated was one of Judge Archbald's counsel, suggested that impeachment evidence be taken by a committee or, preferably in Simpson's view, by U.S. judges, except when the President, Vice President, or a Supreme Court Justice is impeached. Simpson shared Senator Sutherland's observation about attendance during the Archbald trial: "[T]he thing that strikes a common law lawyer most is the few Senators who in fact listen to the evidence. During the Archbald Impeachment the membership of the Senate exceeded ninety, yet rarely over twenty members were present." A. Simpson, A Treatise on Federal Impeachment 67 (1916).

Simpson regretted that few Senators actually heard testimony directly, but he also expressed his understanding that, after periodic quorum calls during the trial, Senators would "return [move] from whence they came, leaving the Senate as bare as it had been before. While that result was, and in all such cases must be regretted, yet it is not so much to be wondered at. Most of the work of Congress must now be done by committees, and the Senator who really attends to the work, and is present at the important legislative sessions of the Senate, has all his official time fully occupied." Id.

The impeachment trial in 1933 of District Judge Harold Louderback brought again to the fore the problem of attendance at impeachment trials. Three years after the trial, Representative Hatton Sumners, chairman of the House Committee on the Judiciary and one of the managers at the trial recalled the scanty attendance of Senators, noting: "At one time only three Senators were present, and for 10 days we presented evidence to what was practically an empty Chamber." Impeachment No. 13, Time, March 16, 1936, at 19.

In reaction to the Louderback trial and at the urging of many Senators, Senator Henry Ashurst, the chairman of the Committee on the Judiciary, offered in 1934 the resolution which became Impeachment Rule XI following its adoption the next year. Senator Norris, who had experienced impeachment trials as a House manager in 1912 at the Archbald impeachment and as a Senator in 1933 at the Louderback impeachment, related to the Senate, as Senator Sutherland had done 20 years earlier, that most Senators in the final analysis would have to study the evidence in a printed record. In Senator Norris' words,

"I think the object of the resolution is to avoid what always takes place in an impeachment trial before the Senate. There are times when there is not a quorum in the Senate present, when a dozen may not be here, when there are less than the number provided as the membership of the proposed committee to take the evidence. There is no use expecting all the Senate, or a quorum of the Senate, to be present every minute while evidence is being taken. Senators have to read the evidence in the RECORD in order to know what it is." 78 *Congressional Record* 9929 (1934).

The use of committees to receive evidence at impeachment trials is a matter, therefore, which has had the attention of thoughtful Senators in this century. In an ideal world we might all prefer that each Senator personally hear all impeachment evidence, just as we might prefer that each Senator personally hear witnesses to every matter bearing upon war or peace or other aspects of the Nation's welfare that we are called upon to consider. However, we are required of necessity to learn through the study of printed records about many of the important matters which compete for our attention.

THE USE OF RULE XI IN THIS IMPEACHMENT

Rule XI, of course, does not require the Senate to receive evidence through a committee nor does it foreclose the Senate, even after evidence has been received by a committee, from calling for some or all of the witnesses to testify in open Senate. The question in any particular impeachment is whether, based on the facts of that impeachment, the rule should be used or used exclusively.

The principal deficiency attributed to rule XI is the contention that the triers of fact, the membership at large of the Senate, are unable to assess the credibility of witnesses. There may, indeed, be cases in which it is essential to observe witnesses directly, and there may be, perhaps, cases in which review of even a videotape is not an adequate substitute for direct observation. While it is not my purpose in these remarks to review in any detail the evidence upon which the Senate convicted Judge Claiborne, I would like to offer several comments about the importance of evaluating the credibility of witnesses in this proceeding.

The point has been urged that the question whether Judge Claiborne wrote to his tax preparer, Joseph Wright, on April 11, 1980, to inform Mr. Wright of his full income from legal fees for 1979 presents an issue of credibility which cannot be determined from the printed record of sworn testimony. The difficulty with this contention is that it assumes that Judge Claiborne had a complete, or at least a compelling, defense if the letter had actually been written.

Of course, if the letter was written after the date it bears, then Judge Claiborne's tax violations would pale beside the potential charges of perjury and the fabrication of evidence. It seemed to me, therefore, that we should begin by assuming that the letter had been written. We could equally assume that, for one reason or another, Mr. Wright had not seen the letter. Ellen Arthur, Judge Claiborne's newly discovered witness, stated in her affidavit that, 2 or 3 days after the judge's secretary had delivered an envelope to Mr. Wright's office, Mrs. Wright had stated that the letter could not be found or had been misplaced.

The assumption that the letter was written on April 11, 1980, does not elevate Judge Claiborne to high ground. Rather, the letter confirms an image of Judge Claiborne produced by other evidence. The judge was a person who had a very good sense of his financial situation. He prepared slips to memorialize his legal fee income and he recorded the information from the slips in a financial diary. On or about March 1, 1980, without consulting his detailed records, Judge Claiborne wrote to his accountant that his legal fee income for 1979 amounted to about $46,000. He was off by about $5,000, but he was in the right neighborhood.

Then, if we continue to assume that he wrote the April 11, 1980, letter on the date it bears, Judge Claiborne made a precise calculation of his legal fee income for 1979 on that day. He performed this calculation by totaling, on April 11, 14 separate items of legal fee income, and writing by hand a letter to his accountant which stated the result of this calculation. Judge Claiborne asked the Senate to believe that 19 days later he simply placed this careful calculation out of mind when he spoke to his accountant about the preparation of his 1979 tax return.

Then, 34 days later, when Judge Claiborne filed his judicial financial disclosure report, he again did not use the figure for legal fee income which he had only recently calculated. The disclosure report diminishes the relevance of another credibility issue; namely, whether Judge Claiborne had signed his 1979 return in blank or whether he signed the return in Mr. Wright's office after the return had been prepared. The disclosure report confirms, no matter who is to be believed about the signing of the tax return, that Judge Claiborne knowingly intended to disclose to the Government, both on his disclosure form and on his subsequent tax return, only part of his legal fee income for 1979. These objective circumstances are sufficient to support the conviction on the first article without resolving the credibility of testimony about ancillary matters.

Then, with respect to the second article, it should be recalled that the case presented by the House consisted primarily of documents, including Judge Claiborne's tax return for 1980, and the testimony of an expert. A letter to Judge Claiborne dated April 6, 1981, from his tax preparer for 1980, Jerry Watson, establishes that Judge Claiborne knew that his tax preparer was planning to report a capital loss on the law practice which the judge had abandoned several years earlier. The patently fictitious capital gains transaction on the previously abandoned law practice, which was used to eliminate $88,000 in ordinary income from legal fees, was sufficient to establish a willful failure to report income for 1980.

The demeanor of witnesses may be important in other impeachments, but in this impeachment the critical facts were fairly established based on solely the written record. Furthermore, as Members were aware, videotapes of the committee's hearing were available to any Member who wished to supplement his or her reading of the transcript of the committee's proceedings.

THE SENATE'S OBLIGATION TO "TRY" IMPEACHMENTS

The Constitution provides that the Senate shall have the power to "try" impeachments. If the word "try" imported into the Constitution the exact specifications of a judicial trial, then the Senate might have little latitude to define its rules of proceedings. However, the Framers did not intend to obligate the Senate to replicate all features of a judicial trial. Hamilton recognized that the Senate "can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security." The Federalist No. 65, at 428 (B. Wright, ed. 1961) Justice Story expressed the similar opinion that "it is obvious that the strictness of the form of proceeding in cases of offences at common law is ill adapted to impeachment." J. Story, Commentaries on the Constitution, § 765, at 532 (3d ed. 1858).

Instead, the requirement that conviction on impeachment be by "trial," I believe, was intended to fulfill the Framers' intent that the Senate act in "judicial character as a court." The Federalist No. 65, at 426 (A. Hamilton). The Framers intended that the Senate perform this judicial function impartially, "to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers." Id. at 427 (emphasis omitted).

In my opinion, the Senate performed its judicial task with complete impartiality. There were many outside of the Senate who thought that this impeachment should have taken the Senate only several hours to resolve after the House exhibited its articles in early August. The Senate determined, instead, that Judge Claiborne should have available to him the subpoena power of the Senate to bring here witnesses who could testify to the tax transactions in 1979 and 1980. These witnesses were examined and cross-examined by counsel and also questioned by members of the committee over 7 days of hearings. The full Senate received briefs from the parties and then heard closing arguments from the managers, from Judge Claiborne's counsel, and from Judge Claiborne. The Senate deferred its decision whether to hear witnesses in open Senate until it heard and considered these arguments. Senators then deliberated with great care prior to voting. In every sense the Members of the Senate fulfilled their special impeachment oath to "do impartial justice according to the Constitution and laws."

I would like to conclude with a brief note of appreciation. Each member of the Impeachment Trial Committee—the vice chairman, Mr. Sarbanes and Mr. Hatch, Mr. Warner, Mr. Rudman, Mr. Pressler, Mr. McConnell, Mr. Heflin, Mr. DeConcini, Mr. Pryor, Mr. Gore, and Mr. Bingaman—approached the task of the committee with a great sense of purpose and seriousness. The membership of the committee agreed to, and then adhered to, a requirement that a quorum, a majority of the 12-person committee, be present at all times. The committee was presented with important questions about the proper scope of the impeachment proceedings before it, and our ability to resolve those questions, wisely I hope, depended on the intelligence and effort which each Member contributed to our deliberations. (S. Doc. 99-48, pp. 343-349.)

(E) STATEMENT OF HOUSE MANAGERS [18]

B. (1) **The Appropriate Use of a Committee Pursuant to Senate Impeachment Rule XI.**

The House Managers are ready to proceed with the impeachment trial of Judge Alcee L. Hastings either before the full Senate or a Rule XI committee. In response to the request for comment on the appropriate use of a Rule XI committee, however, the House Managers suggest that the Senate should consider two separate issues. First, should the Senate invoke Rule XI in these proceedings? Second, if the Senate decides to invoke Rule XI, what is the proper role of the committee?

There is ample precedent for using a committee in the pending impeachment proceeding. The practice, which was first considered by the Senate in the beginning of this century, follows English parliamentary practice. In 1904, Senator George F. Hoar of Massachusetts submitted a resolution, considered by unanimous consent and agreed to by the Senate, directing the Senate Committee on Rules to consider and report on "whether the rules [on impeachment] may properly and lawfully provide for taking testimony in such cases by a committee in accordance with the practice of the English House of Lords . . ." S. Record, 58th Cong., 2d Sess. at 3660.

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[18] Submitted by Alan I. Baron, Special Counsel to Managers of the House of Representatives.
Managers of the House of Representatives (100th Congress): Peter W. Rodino, Jr., John Conyers, Jr., Don Edwards, John Bryant, Hamilton Fish, Jr., and George W. Gekas.
Impeachment Trial Staff (100th Congress): Alan I. Baron, Special Counsel; Janice E. Cooper, Assistant Special Counsel; Patricia Wynn, Assistant Special Counsel; Lori E. Fields, Assistant Special Counsel.
House Judiciary Committee Staff Participating in Impeachment Trial Preparation (100th Congress): M. Elaine Mielke, General Counsel; Alan F. Coffey, Jr., Associate Counsel; and Peter Levinson, Counsel.

In 1935, the Senate adopted Rule XI in an effort to balance its constitutional role of acting as a Court of Impeachment with the demands of legislative business. In 1936, the then Chairman of the Senate Judiciary Committee, Senator Ashurst of Arizona, explained that the recent impeachment trial of Judge Louderback

> . . . was dreary, involved and protracted, and that it was not according to public policy to have 96 Senators sit and take testimony. Subsequently, not a dozen, not 20, but at least 40 Senators urged that the Senate Committee on the Judiciary give its attention to the question whether or not a committee appointed by a Presiding Officer could take the testimony in impeachment trials, whereupon a resolution was introduced . . . and was adopted . . . .

80 Cong. Rec. 3424-3425 (1933) (remarks of Senator Ashurst).[5] In 1986, the Senate invoked Rule XI, during the impeachment trial of former Judge Harry Claiborne.

The use of a committee by the Senate when sitting as a Court of Impeachment is consistent with the practice of the House of Lords. As explained by Thomas Jefferson when setting forth English impeachment procedures, "the practice is to swear the witnesses in open house, and then examine them there; or a committee may be named who shall examine them in committee, either on interrogatories agreed on in the House or such as the committee in their discretion shall demand." Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 279, 99th Cong., 2d Sess., section 614 (1987).[6]

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[5] See 3 L. Deschler, Deschler's Precedents of the United States House of Representatives, section 18.6 (1977).

[6] Parliamentary history establishes that the House of Lords consistently used committees to hear the evidence presented by the House of Commons on a charge of impeachment. For example, as early as 1621, the House of Lords appointed a committee to hear witnesses in the impeachment proceeding of Lord Chancellor Francis Bacon. 2 A Complete Collection of State Trials and Proceedings for High

The House Managers are of the view that the appointment of a committee in an impeachment proceeding is a matter within the Senate's sound discretion. The Senate's "sole power to try all Impeachments," established in Article I, section 3 of the Constitution, includes the power to determine the procedures by which it exercises that authority. The appointment of a committee, however, is not mandatory. Thus the issue arises whether the Senate should invoke Rule XI in the pending proceedings on the impeachment of Judge Hastings. The House Managers respectfully suggest that a number of factors deserve consideration when the Senate exercises its discretion.

The impeachment of Judge Hastings is of no greater or lesser importance than the impeachment of former Judge Claiborne. In both cases the House of Representatives determined that the respondent had engaged in misconduct which violated the public trust, warranting removal from public office. The Senate used Rule XI in the impeachment trial of former Judge Claiborne. This precedent is a useful starting point from which to plan the proceedings in the pending case. In the Claiborne impeachment proceedings, the Rule

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Treason and Other Crimes and Misdemeanors 1101 (1816). Similarly, in the politically significant proceeding on the impeachment of the Earl of Middlesex in 1624, the House of Lords relied upon a number of committees to take evidence. Id. at 1197.

Following the presentation of the evidence by the House of Commons to a committee, the House of Lords would draw up a charge and forward it to the respondent. In the case of Lord Bacon, upon receipt of the charge he confessed and the House of Lords proceeded with judgement and sentencing. E. Foster, The House of Lords 1603-1649 155 (1983). In the case of the Earl of Middlesex, the proceedings continued before the House of Lords. It appears that the testimony taken in committee was read and the Earl of Middlesex was then allowed to respond. Id. at 158-159. He was not allowed the opportunity to reexamine witnesses. Id. At the conclusion of the proceeding the House of Lords found him guilty and sentenced him. Id. See generally Williams, The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials, 50 N.Y.U. L. Rev. 512, 528-532 (1975).

XI Committee received the evidence in a timely manner and developed a full record for the entire Senate.

The nature of this case -- the large number of articles and the complicated facts on which they are based -- suggests the use of a Rule XI committee. The House Managers will attempt to stipulate with the respondent to the authenticity of documents and to facts that are not in dispute. Even if such stipulations are entered into, however, a large number of witnesses will be necessary in order to present the evidence supporting the 17 Articles of Impeachment.

The verdict of acquittal in Judge Hastings' criminal trial does not require the full Senate to sit as a body to take evidence during the impeachment trial. Article I, Section 2, clause 7 of the Constitution provides that impeachment is separate and distinct from a criminal prosecution. This fundamental constitutional principle, coupled with the Senate's "sole Power to try all Impeachments," establishes that a Senate impeachment trial is a self-contained, independent process. Criminal proceedings and impeachment serve fundamentally different purposes: the former is designed to punish an offender and seek retribution, while the latter is the first step in a remedial process. The purpose of impeachment is not personal punishment, but rather to maintain constitutional government through removal of unfit officials from positions of public trust. Thus the Senate's decision whether to appoint a Rule XI committee in an impeachment proceeding is wholly independent of a prior criminal prosecution, notwithstanding a jury verdict of acquittal or conviction.

If the Senate decides to invoke Rule XI in this case, it must also determine the proper role of the committee. In the Claiborne proceedings, the Rule XI committee conducted the pretrial proceedings and presided over the taking of testimony. The House Managers have no objection to following this precedent.

The House Managers believe that the Senate should avoid bifurcating the presentation of evidence in this impeachment trial. While Rule XI does not preclude the Senate "from sending for any witness and hearing his testimony in open Senate," the presentation of some evidence only to the full Senate and other evidence only to a committee runs the significant risk that undue weight will be placed on the evidence presented on the floor of the Senate. Such a result is unfair to both parties. The House Managers are unaware of a legitimate means of dividing the evidence. One witness is not necessarily more important than another. Nor is one article of impeachment more important than another.

There are steps the Senate might consider to ensure that all of its Members are fully apprised of the evidence submitted to a Rule XI committee. Senators who are not appointed to the committee can be encouraged to attend the committee proceedings whenever possible, and space could be reserved for them. A videotape of the Rule XI committee hearings, edited to eliminate any time delays, can be made available to all Senators or played on the floor of the Senate prior to the final vote on the Articles of Impeachment. A daily transcript of the committee proceedings can also be sent to each Senator for review.[7]

None of these procedures are constitutionally required. The House Managers mention these procedures as ideas for the Senate's consideration.

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[7] When Rule XI was enacted it was contemplated that the Senate could have the evidence submitted to the committee "reduced to writing, and laid before the Senators the next morning in the Congressional Record. If the Senator were absent during one day of the trial, he could read the testimony as printed the next morning." 80 Cong. Rec. 3424, 3425 (1933) (remarks of Senator Ashurst)

(F) STATEMENT OF JUDGE ALCEE L. HASTINGS [19]

September 6, 1988

To: THE COMMITTEE ON RULES AND ADMINISTRATION OF THE UNITED STATES SENATE

Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Use of a Rule XI Senate Trial Committee to Receive Evidence in this Case.

The Committee asked us to submit Judge Hastings's views on the appropriate use of Rule XI of the Rules of Procedure and Practice in the Senate When Sitting in Impeachment Trials in the pending impeachment. We do not believe Rule XI, as presently drafted, can properly be used in the trial of this impeachment. We develop those views in part I of this memorandum. In connection with that request, the Committee also asked us to provide such detail as was feasible concerning the number of witnesses to be called, the nature of their testimony, and the amount of time to be consumed in the presentation of the judge's case. In so far as we can determine, the Senate has ordinarily insisted that the House provide this information to the accused *before* the accused was required to frame a response. Nonetheless, we have responded to the request in part II of this memorandum.

I.

The Senate should not delegate the function of hearing testimony and receiving evidence to a Rule XI Senate trial committee in the trial of the present impeachment.[1] Three points compel this conclusion:

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[19] Submitted by Counsel to United States District Judge Alcee L. Hastings: Terence J. Anderson, c/o The University of Miami, School of Law, Coral Gables, Florida 33124-8087—(305) 284-2971

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1 Rule XI, as presently drafted, appears only to authorize the appointment of a Senate committee to receive testimony and other evidence in connection with the trial of an impeachment. For reasons developed in the text, we think it clear that use of a committee for that purpose in this case would be improper.

There is precedent in England and in the Senate for the use of committee's to address certain pretrial matters, and the procedures by which federal courts may delegate such duties to a magistrate are now codified at 28 U.S.C. § 636 (1982 & Supp. IV 1986). The use of a committee to assure proper discovery and to make preliminary determinations on pretrial matters, such as those typically embodied in a pretrial order in preparation for a jury trial in a federal court, might facilitate the trial of this impeachment. We do not, however, understand Rule XI to authorize this procedure. Accordingly, we have not addressed whether and to what ex-

1. The fact that a jury has rejected most of the allegations that the House has made precludes the use of a Senate trial committee in this case. The twelve jurors who heard witnesses testify and observed their demeanor under examination and cross-examination were unanimous in their view: Judge Hastings was not guilty. If the allegations are to be retried, no Senator should be required or permitted to repudiate that finding unless he or she has also heard the witnesses and observed their demeanor and has, upon that basis, concluded that the jury was wrong.

2. The procedures employed by the House, and those that preceded its action, so far departed from the procedures employed in prior inquiries into a judge's conduct as to undermine the integrity of the process. Those departures enhance the need for the Senate to assure that Judge Hastings is accorded every right and protection customarily accorded by the Senate in the trial of an impeached judge in order to redress the balance and to assure confidence in the integrity of the outcome. For that reason also, the articles must be tried before the full Senate without resort to innovative special procedures of doubtful constitutionality that all must concede diminish in some degree the dignity of the proceeding and the rights of the accused.

3. The trial should be conducted before the full Senate in order that the Senate and the people may assess whether the constitutional plan should be altered. It has been more than fifty years since an impeachment was tried before the full Senate. Congress has attempted legislative revisions intended to avoid or limit the burdens imposed by the cumbersomeness of the process, and Rule XI represents a similar effort by the Senate. Both those efforts are of doubtful constitutionality, and there are those who believe that the Congress and the Nation should confront the issue directly and consider amending the Constitution to provide alternate mechanism for removing federal judges. Those on either side of the question should insist that any trial in this case be conducted in the traditional way so that there is a contemporary basis for any debate over whether the system works and whether or what revisions are necessary or proper. Those who have not tried it should not seek to change it. These points are developed below.

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tent the Senate might properly appoint a committee for such pre-trial purposes. We would be happy to address this matter should the Committee so request.

1. Deference to the Jury Commands A Trial in the Full Senate.

a. *Background*: In 1981, the government alleged that United States District Judge Alcee L. Hastings had been a participant in a corrupt scheme in which Washington attorney William Borders had solicited and accepted a bribe. It had no direct evidence that Judge Hastings was involved. Indeed, the FBI had decided in advance to arrest Borders at the scene of the payoff, rather than waiting to see if any part of the money would go to Judge Hastings. Judge Hastings denied any knowledge of or involvement in Borders's scheme. Given the government's conduct, he suggested that it appeared that he was a victim of an over-reaching or incompetent FBI sting operation *as well as* a corrupt lawyer's "rainmaking" scheme.[2]

The government's charges against Judge Hastings were tried before a jury in early 1983. The prosecutors acknowledged that the evidence against him was only circumstantial, but claimed that it established guilt. Judge Hastings testified that he was innocent and submitted evidence in support of that claim. He provided innocent explanations for the various circumstances which the prosecutors had offered as evidence of guilt. He was cross-examined fully. In closing, the prosecutors argued, point-by-point, that the judge's testimony was false and his evidence fabricated. The jury, the only body that has ever heard the testimony and considered the evidence and arguments *on both sides*, rendered its unanimous verdict on February 4, 1983: "Not guilty; so say we all."

Eleven of the articles of impeachment exhibited by the House simply restate allegations which the jury that heard the evidence on both sides at the 1983 trial unanimously rejected. The prosecutors presented their circumstantial evidence and claimed that it established that Judge Hastings was a participant in, rather than a victim of, Borders's corrupt scheme. The jury rejected that claim. The prosecutors claimed, point-by-point, that Judge Hastings's testimony was false and his evidence was fabricated and argued that only guilt could induce a judge to present false testimony and fabricated evidence. The jury rejected those claims. The articles of impeachment reallege that Judge Hastings was a participant in Borders's corrupt scheme (article I). That is a claim that the jury rejected. The articles of impeachment allege, point-by-point, that Judge Hastings's testimony at trial was false and his evidence was fabricated (articles II-IX and XIV-XV). Those are claims that the jury rejected.

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[2] Judge Hastings's presented claims stemming from the conduct of the FBI and the Justice Department in the proceedings before the trial court. The designated judge ruled, however, that these questions should be deferred for consideration, until after the trial. The court did not address any of those claims.

b. *Analysis*: The House has now called upon the Senate to readjudicate those allegations. In so doing they ask the Senate to impeach a jury's verdict, a verdict reached by another constitutional institution serving in a coordinate branch of government. If those allegations are to be retried and redetermined,[3] then respect for the jury as well as fairness to the accused should preclude the use of innovative short cuts by the Senate, such as those involved in the designation of a Senate trial committee to receive testimony and other evidence.

Those twelve jurors heard the testimony live. Those twelve jurors observed every witness as he or she was being examined and cross-examined. Those twelve jurors saw the other evidence as it was received. Those twelve jurors heard the contemporaneous arguments by counsel for both sides. The twelve jurors that sat through the trial and heard the witnesses testify and observed their demeanor under examination and cross-examination were unanimous in their verdict: Judge Hastings was not guilty.

If the charges are to be retried and redetermined, then the Senators must do what the jurors did. Those Senators who would repudiate the jury's verdict must also hear the witnesses live; they must also observe their demeanor under examination and cross-examination; they must consider the other evidence in the context of the testimony through which it is received; they must hear and consider the evidence against the background afforded by the opening statements made by the parties; and they must afford the parties the opportunity to address them in closing with confidence that they have heard and seen the evidence and can fully appreciate the arguments being advanced. Surely the Constitution and the requirements of basic fairness to the accused demand no less. Moreover, the nature of the allegations made by the House confirms the necessity for a trial before the full Senate.

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[3] The question whether a retrial is consistent with sound constitutional principle and policy is not before the Rules Committee and will have to be resolved by the full Senate after the initial pleadings have been filed.

Under each of the allegations made, the credibility of the witnesses would be central to a fair determination. For example, all have conceded that the evidence that supports the conspiracy alleged in article I is circumstantial.[4] For that reason, in a trial, the Senators would be required to assess the credibility of each of the witnesses who testified to the circumstances. The issue would be whether the testimony that established innocent explanations for those various circumstances, individually and as a whole, was credible and adequately undermined the darker view urged by those who claimed they established guilt. The decision would necessarily depend upon nuances that could only be assessed by those who had heard the testimony and observed witnesses. This the jurors did; this those who would impeach that verdict must do.

Assessing the credibility of the testimony would be equally central to a determination of the allegations set forth in the other articles. Articles II through XV simply parse and fragment the testimony that the judge gave at his trial and allege that in fifteen separate instances, he "did knowingly . . . make a false statement that was intended to mislead the trier of fact."[5] These allegations make the credibility of Judge Hastings the central issue to be determined and would, in most instances, require the trier of fact to assess his credibility against the credibility of witnesses called by his accusers.[6]

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[4] The government's decision to arrest Mr. Borders at the scene of the payoff, rather than following the money so that the judge's innocence or guilt might be directly established, assured that the evidence would forever remain circumstantial.

[5] Apart form the allegations set out in articles X-XIII, the prosecutor's submitted these allegations to the jury in the 1983 trial, arguing that only guilt in the underlying conspiracy could induce a judge to lie under oath. See Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary of the House of Representatives Pursuant to H. Res. 128 Impeaching Alcee L. Hastings, Judge of the United States District Court for the Southern District of Florida, of High Crimes and Misdemeanors, Ser. 11, 100th Cong. 2d Sess. [herein-after "Hearings"], Appendix III (Submissions by Judge Hastings [herein after "App. III""], 308 ("Perjury Charges Not New: 1983 Jury Rejected 'False Testimony' and 'Fabricated Evidence' Charges Against Judge Hastings") (citing transcript of prosecutor's closing argument at 1983 trial).

The necessity that the trial of this impeachment be conducted before the full Senate does not require consideration of constitutional nuance; it is established by principles that are at the core of our system of adjudication. The central purposes of guaranteeing the accused the right to confront the witnesses against him and to cross examine them before the jurors who will decide the case has been long recognized and recently reaffirmed:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but also of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[7]

If the full Senate were only to receive transcripts of testimony taken by a Rule XI Senate trial committee, it would be using "depositions" and making credibility determinations without "compelling each witness to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon on the stand and the manner in which he gives testimony whether he is worthy of belief." Such a procedure in the present case would conflict with values that are at the core of our Constitution.[8]

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[6] The allegations made in article XVI also make credibility the central issue. The triers of fact will have to decide whether to believe Mayor Steven Clark or Judge Hastings and, in so doing, will have to consider also the credibility of such other witnesses as may be called to corroborate the conflicting versions presented.

[7] Kentucky v. Stincer, 107 S.Ct. 2658, 2662 (1987)(Blackmun, J.), quoting Matton v. United States, 156 U.S. 237, 242-43 (1895); see also Coy v. Iowa, 108 S.Ct. 2798, 2800-03 (1988) (Scalia, J.) (confirming necessity that witnesses confront accused before jury), and California v. Green, 399 U.S. 149 (1970) (White, J.) (confirming requirement that available witnesses be brought and compelled to submit to cross-examination before jury).

[8] Those values are so central that they are embodied in the Due Process Clause and the common law rules of evidence as applied in civil jury trials. It is now

2. The Procedures that Preceded the Exhibition of the Articles of Impeachment Further Establish the Need for a Trial Before the Full Senate.

a. *Background*: Shortly after the 1983 trial, the judiciary launched its own investigation. For three and a half years, a committee of five judges, aided by paid lawyer-investigators and by FBI agents, sought additional evidence against the judge. At the outset of their hearings,[9] they that announced they would not be bound by the common-law or the Federal Rules of Evidence and that those rules would be used only when the committee thought them appropriate.[10] They called all of the witnesses *against* Judge Hastings, but called only eight of the more than forty witnesses who had testified *for* the judge at trial.[11] The five-judge committee admittedly found no material evidence against Judge Hastings that had not been available to the prosecutors at the time of trial. Nonetheless, they repackaged the evidence against the judge in a 381-page report and claimed that it showed that the jury was wrong -- that the judge was guilty and had presented false testimony and fabricated evidence at his trial

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fairly established that the federal and state governments may not terminate statutory rights to hold office conferred upon low level government employees without affording them an adversarial hearing before a trier of fact at some stage of the proceeding. See e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) (White, J.) (security guard and bus mechanic); see also In re Peterson, 253 U.S. 300, 311 (1920) (Brandeis, J.) (holding that use of pretrial referral to auditor did not impermissibly infringe upon plaintiff's right to jury trial because the "parties will remain as free to call, examine, and cross-examine witnesses [at the trial before the jury] as if the [auditor's] report had not been made").

[9] More than a year before the five-judge committee began its hearings, Judge Hastings had filed suit challenging the constitutionality of the Act and the manner in which it was being construed and applied against him. The case had been briefed and argued and was pending decision in the court of appeals. In order to avoid administrative exhaustive issues, Judge Hastings filed a special appearance objecting to the committee's proceedings. He did not otherwise participate in those hearings. See Hearings, App. III, 9-12 (for a summary).

[10] Hearings, App. I at 491.

[11] The committee did discover, incidentally, evidence supporting Judge Hastings allegations concerning misconduct of the FBI and the Justice Department. These issues were not pursued, however, and the evidence discovered was not disclosed or discussed in the committee's report.

In reality, the report prepared by the five-judge committee appears to have constituted the basis upon which the matter was certified to the House. The judicial council for the circuit ratified the allegations and certified them to the Judicial Conference after a single meeting and less than a month after the report had been submitted to it. The Judicial Conference voted to certify the allegations to the House less than two hours after it convened for one of its semiannual meetings on March 17, 1987. There is no indication that the members of either of these bodies received or reviewed the 4880-page transcript or the 2800 exhibits that the five-judge committee had compiled.

In the House, the inquiry was referred to an eight-member subcommittee, which obtained the services of special counsel, aided by four lawyers and supporting staff, to assist it. From the outset, Judge Hastings asked that the subcommittee permit his counsel to have a role comparable to that accorded judges in prior impeachment inquiries to assure that all proper avenues of investigation were explored and in order that his counsel as well as special counsel retained by the House Committee on the Judiciary could be properly prepared to present such testimony and evidence at the subcommittee's hearings as might be necessary to enable the subcommittee to make a proper record and recommendation. These requests were summarily rejected, and Judge Hastings's counsel were excluded from all phases of the prehearing inquiry.[12] After a year of silence, the product of this third investigation was unveiled: There was still no material evidence *against* the judge that was new. Nonetheless, after six days of hearings, the subcommittee recommended that Judge Hastings be impeached. Two aspects of the proceedings that produced the pending articles bear upon the issues at hand.

First, the House subcommittee that conducted the inquiry concluded that no rules of evidence should apply and that counsel for Judge Hastings should not be permitted to interpose any objections to evidence produced by special counsel or procedures employed during the subcommittee's hearings.[13] Under the procedures it established, the subcommittee did not hear the witnesses who testified at trial and refused to hear testimony from witnesses whom Judge Hastings asked it to call. The principal "witness" against Judge Hastings was the *lawyer* to whom the judiciary had paid more than $500,000 for conducting the post-trial investigation and preparing the 381-page report that recommended the judge's impeachment. He "testified" for two and a half days. The subcommittee called only two of the seventeen witnesses who had testified for the government at the 1983 trial; it did not call any of the more than forty witnesses who had testified for Judge Hastings. The subcommittee sat for five and a half days listening to testimony *against* Judge Hastings, but allowed only a half day for witnesses to testify *on his behalf*. Judge Hastings asked the subcommittee to call seventy witnesses so that they could be examined; of those, the subcommittee called only two, neither of whom had any information concerning the accusations made in the first fifteen articles. At the end of its hearings, it allowed the lawyer for Judge Hastings only *fifteen minutes* to state the case on his behalf.[14]

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[12] The prehearing practices observed by the subcommittee are described and the exchange of correspondence with Judge Hastings is reproduced at Hearings, App. III, 1-57.

Second, the Committee on the Judiciary and the full House merely ratified the subcommittee's recommendations without independent review. The Committee on the Judiciary recommended the seventeen articles of impeachment *before* the record of the subcommittee's inquiry had been printed or distributed. The resolution adopting those articles was adopted by the full House less than a week later and one day after the summary report of the committee on the judiciary was printed.[15]

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[13] Counsel for Judge Hastings made it clear that the procedures employed by the subcommittee represented a dramatic departure from precedent, practice, and rule in prior impeachment inquiries and deprived the accused of rights that had been accorded the officeholder in every formal inquiry conducted in this century (apart form the inquiry conducted with respect to a convicted Judge Harry Claiborne). Judge Hastings submissions on these points are reproduced at Hearings, App. III, 1-30, 244-50, 294-300, 458-63. Apart from some latitude on cross-examination granted on the fourth day of the hearings, all requests for relief were summarily rejected.

[14] Notwithstanding the one-sided nature of the investigations in all three branches of government, after seven years, four points remained unchallenged. The case against Judge Hastings was and remains circumstantial. No one has ever suggested that Judge Hastings ever received any money from Borders, and all have conceded that there was nothing in the judge's background to suggest that he could have been induced to sell his office. No one has discovered any material evidence against Judge Hastings that was not available to the prosecutors at the time of the 1983 trial. Witnesses have died, documents have been destroyed, and memories have dimmed over the past seven years: What is left is the evidence that the government has chosen to collect and preserve.

b. *Analysis*: Something is wrong. The Constitution sought to protect federal judges by guaranteeing secure tenure and compensation that could not be diminished. The three branches of government have now spent seven years and more than $2 million relentlessly investigating and reinvestigating the same allegations, without regard for the extraordinary psychological and economic burdens that their actions imposed upon the judge, his family, and his supporters. Seven years is too long; $2 million is too much; and one trial should have been enough.[16]

The Senate does, however, have the articles before it, and the Senate must dispose of them. We do not suggest that the Senate Rules Committee or the Senate can properly dispose of them at this stage on the basis of claimed defects in the House's procedures. We do submit, however that the procedures employed in the House and the judiciary enhance the need for a full trial on the Senate in two ways:

(1) The reliance upon "committees" and the procedures those committees employed in the prior proceedings precludes further delegation and establishes the need for a plenary proceeding at this stage; and

(2) This is the first impeachment that is the result of a certification by the judiciary under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act").[17] As such, the case would merit careful scrutiny by the full Senate in any event. More importantly, the procedures employed within the judiciary as well as those

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[15] Impeachment of Judge Hastings: Report of the Committee on the Judiciary to Accompany H. Res. 499, H. Rep. 810, 100th Cong. 2d Sess. (August 1, 1988) (distributed August 2, 1988); [hereinafter "Impeachment Report"] .

[16] As conservative columnist James J. Kilpatrick concluded, after reviewing the report submitted by the judiciary: "This won't do. If impeachment would not be double jeopardy in law, it would be double jeopardy in fact. This strikes me as intolerable. Hastings is not my kind of judge, but fair's fair. Call the whole thing off." Kilpatrick, "Hastings Was Acquitted, Now Leave Him Alone" (Oct. 31, 1987).

[17] Pub. L. No. 96-458, 94 State. 2035 (1980), codified as amended at 28 U.S.C. § § 331, 332, 372(c), 604(h) (1982 Supp. IV 1986)

adopted by the House make it clear that a trial before the full Senate is now the only way that the Senate can properly execute its constitutionally assigned role in maintaining the proper separation between the judicial and the legislative branches and in protecting the independence of the individual judge in this case. We develop both views below.

(1)

The articles of impeachment are in reality a product of the work of two committees:

-- the five-judge committee that conducted twenty-seven days of hearings and thereafter prepared a 381-page report stating its view the evidence against Judge Hastings, and

-- the eight-member subcommittee that, in effect, audited the work of the five judge committee and then conducted eight days of hearings to lay a foundation for its concurrence in the recommendation that Judge Hastings be impeached. The use of committees and subcommittees for the conduct of impeachment inquiries is both necessary and established practice. Two aspects of their use in this case, however, mark the procedure here as extraordinary -- the extent to which the House subcommittee relied upon the work of a committee in the judicial branch, and its subsequent refusal to permit Judge Hastings to call witnesses in order to test the credibility of the evidence and report compiled by that committee.[18]

It is clear that the framers intended that the House and the Senate perform their functions independently when they proposed that the sole power of impeachment be assigned to the House and the sole power to try impeachments be vested in the Senate. At least with respect to the trial function, they explicitly rejected the idea that the power should be vested in the Supreme Court or a separate council.[19] One of the grounds for this rejection was that the members of the Supreme Court would be too few in number to serve the function adequately and that the membership of a council must either share that defect or constitute an institution

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18 The need for such witnesses and the specific witnesses necessary were forcefully presented to the House subcommittee. *See* *Hearings, App.* , 251-67, 271-89, 294-300. The subcommittee declined to call these witnesses.

19. *See, e.g., The Federalist No. 65 (Hamilton)*, 439-445 (Cooke ed. 1961).

whose limited function would not justify its existence.[20] The clear intent was that an accused official would be tried by the full Senate, precisely because such a trial was necessary to afford the accused the intended protections. It is also clear that the framers concluded that the need for judicial independence enhanced the need for these institutional protections in cases against federal judges.[21]

Whatever the general effect of these provisions, they establish the need for a trial before the full Senate in this case. A committee of judges conducted a one-sided investigation and prepared a report that marshalled evidence to support their recommendation that Judge Hastings should be impeached. The resulting report and the credibility of its authors were such that its conclusions appear to have been routinely ratified and adopted after only cursory review within the judiciary. The House subcommittee, in so far as the record reflects, merely audited the record and report compiled by the committee of judges and embellished its work by fragmenting one of the recommended grounds for impeachment into fifteen separate articles. The House promptly adopted the recommended articles, without further review, and transmitted them to the Senate.[22]

As matters now stand, thirteen officials, five judges and eight members of the House, may fairly claim to have studied the evidence *against* Judge Hastings and to have concluded that it warranted impeachment. Twelve officials, the twelve citizens called to serve on the constitutional institution of the American jury, may fairly claim to have heard and studied the evidence *on both sides*. Those twelve were unanimous in their view that the evidence on both sides required that they reject the allegations made in eleven of the article now before the Senate.

By any fair and realistic view of the proceedings, Judge Hastings has been summoned to the bar of the Senate because the thirteen officials disagreed with the twelve. The

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20. See, e.g., Id. at 441-42 ("The necessity of a numerous court for the trial of impeachments" articulated).

21. See, e.g., The Federalist No. 79 (Hamilton), 531-34, 532-33 (impeachment and trial provisions the only "precautions for their responsibility . . . consistent with the necessary independence of a judicial character").

22 This analysis does not apply to the allegations set forth in article XI of the articles of impeachment. That article alleges new matters, but they are matters that may be simply tried and decided.

issues presented by the allegations set forth in the articles should not again be delegated to a committee by the Senate. This time they should be fully and fairly tried by the 100-member court specified by the Constitution, and no further short cuts should be permitted in the name of expediency.

(2)

This is the first case to come before the Senate as a result of the procedures established by the Act. For that reason alone, it is a case that merits careful scrutiny by all members of the Senate -- those who are concerned with establishing alternatives to the cumbersome process of impeachment and trial as well as those whose principal concern is with maintaining the independence of the federal judges from further erosion by experiments such as those embodied in the Act. The concerns on both sides are magnified by the procedures that were followed in this case.

The Act represented an experiment that respected members of the Senate thought unconstitutional.[23] The argument was forcefully made, in response, that the constitutional allocation of powers would be honored and the necessary independence of judges protected because the House and Senate had retained their respective sole powers and would exercise them independently, without undue deference to the views of the judicial branch. Two respected jurists who studied the question in the context of the proceedings within the judiciary in this matter have expressed substantial scepticism.[24]

The proceedings to date largely bear out the view of the sceptics. The House and its subcommittee made clear the extent to which they thought deference was due the report and recommendations submitted by the judiciary. There is now substantial ground to fear that, through the Act, the Congress has tacitly amended the Constitution and adopted a modified form of joint-address. Under this view, the tacit amendment might be stated:

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[23] See, e.g., Ervin, Separation of Powers: Judicial Independence 35 Law & Contemp. Probs. 108 (1970) (former Senator); cf. Hollomon, The Judicial Reform Act: History Analysis, and Comment, id. at 128. (former chief counsel to Senate Judiciary Committee).

[24] See Hastings v. Judicial Conference of the United States , 770 F.2d 1093, 1104-11 (D.C. Cir. 1985) (Edwards, J., concurring); Hastings v. Judicial Conference of the United States, 829 F.2d 91, 109-11 (Buckley, J. concurring in part and dissenting in part).

> The judiciary may petition Congress for the removal of an article III judge. If a House subcommittee concludes the recommendation is adequately supported and if a majority of the House ratifies that determination, then the House shall submit the matter to the Senate. If this Senate concurs, by a vote of two-thirds of the members present, then the judge shall be removed.

In this view, the issue upon which this Committee must now advise the Senate is whether the Senate should dilute the constitutional system further by delegating its function to hear testimony and receive other evidence to a committee and by limiting its role to hearing arguments and deciding whether to grant or withhold its concurrence on the basis of a paper record compiled by a committee.

Judge Hastings is the first federal judge who has been acquitted upon the unanimous verdict of jury following an investigation by the grand jury and prosecution by the executive. Judge Hastings is, for that reason, the first acquitted official to be impeached on allegations that he committed the crimes of which a jury had acquitted him. Judge Hastings is the first judge that the judiciary has certified to the House after conducting an extensive independent investigation under the Act. Apart from the case involving the convicted judge, Judge Hastings is the first official in more than one hundred years who has been denied the right to object to evidence and call witnesses on his own behalf in an impeachment inquiry conducted in the House.

Judge Hastings is aware that, at all stages, his accusers have found the means chosen to be necessary and proper expedients designed to achieve a desired end. He submits here, however, that he has served as a constitutional guinea pig for long enough. He submits that, if he is to be tried, the Senate should do it the old-fashioned way, the way established by its precedents extending over the first 150 years of the nation's history, the way honored in every impeachment trial in our nation's history, other than the trial of the convicted official. He submits that all aspects of the trial, from opening statement through closing argument, should be conducted before the full Senate so that all Senators may properly execute their constitutional duty to serve as both jurors and judges.

3. The Senate should Conduct the Trial Before the Full Senate to Create a Record Upon Which the Congress and the People May Consider Whether Further Revisions in the Procedure Established for the Removal of Judges are Warranted.

For the first 150 years officials in all three branches acted as if they had a shared understanding of the meaning and effect of the constitutional previsions adopted to guarantee the independence of federal judges through the tenure and compensation guarantees that were terminable only through the designedly cumbersome processes of impeachment by the House and trial by the Senate. Until 1936, the executive never attempted to prosecute a sitting federal judge; complaints were routinely referred to the House. Throughout that period and, indeed, until 1970, the judiciary recognized that the processes of appellate review, the use of writs of mandamus and prohibition, and the powers of supervision exercised by appellate courts were the formal means by which the conduct of the judges of inferior was to be regulated and, where appropriate, criticized. Throughout that period, the judiciary also recognized that peer pressure constituted a powerful, albeit informal, source of power to regulate and sanction the aberrant judge. Until the 1970's, the judiciary did not conceive itself as having the power to conduct administrative investigation and hearings or to impose administrative sanctions. Assuredly, it never sought or exercised any formal role in the processes by which judges were appointed or removed.

During that period, the House and the Senate accepted and discharged the duties imposed upon them by the Constitution. The House conducted more than forty inquires into the conduct of federal judges, almost all of them inquiries directed at the conduct of trial court judges.[25] During that period, the House impeached ten judges and exhibited its articles to the Senate. During that period, the Senate, the full Senate, tried judges. It acquitted five, and convicted four.[26]

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[25] *See e.g.*, House Committee on the Judiciary, *Impeachment: Selected Materials on Procedure*, 93d Cong., 2d Sess. (Comm. Print 1974) [hereinafter "Impeachment Procedures"] (accurate but incomplete listings).

[26] *See* *Impeachment Report*, *supra* n.15, 6-7 (for a summary); *Impeachment Procedures*, v. (for list of trials through 1933). The last full trial in the Senate was

There have been complaints about the system throughout. There have been complaints about judges who abused their freedom without so comporting themselves as to merit impeachment. There have been complaints by Senators about the burdens imposed upon the Senate's legislative time by the need to try an impeachment of district court judges.[27] Those complaints notwithstanding, throughout that period, the Senate accepted the responsibility assigned it by the Constitution and executed it in accordance with established precedent.

The changes during the past fifty years, and especially during the past decade, have been dramatic in the aggregate. The executive has discovered and vigorously exercised a power to investigate the conduct of the judges who the framers sought to protect from fear by the executive coercion so that they might better serve as impartial, independent, and fearless adjudicators in disputes where the powers of the executive were challenged by the individual citizen. As the present case indicates, the powers the executive now claims are expansive and subject to few limitations -- the use of criminal informants, undercover sting operations, electronic surveillance, and the powers of the grand jury may all be brought to bear upon the individual judge. Today, the accused citizen must submit disputes with the executive that concern his or her liberty and property to a judge who sits knowing, "There, but for the grace of the prosecutor, go I."

Over the same period, the corporate judiciary emerged with its Judicial Conference and circuit councils and conferences to improve the administration of the courts. That the resulting administrative burdens imposed upon the district judges of the trial courts were necessary does not alter the fact that they added to the burdens and constraints that had always existed. The contemporary drive for accountability and efficiency have also had their impact. The financial disclosure provisions of the Ethics in Government

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the trial of Judge Ritter in 1936. The list does not include Judge Ritter's trial or that of Judge English who retired during trial.)

[27] *See, e.g.*, *Proceedings of the United States Senate in the Trial of Impeachment of Harold Louderback*, 72nd Cong., 2d Sess. & 73rd Cong., 1st Sess., 10-12 (complaints by Senator Long about the Senate "fiddling its time away over a little impeachment fiasco" concerning "some judge in California").

Act[28] and the requirements imposed by the Speedy Trial Act[29] are but two illustrations. That the burdens imposed by such statutes were also necessary and proper does not alter their character as added burdens. District judges today must now serve as junior executives in the corporate bureaucracy as well as executing their constitutional duty to preside over cases and controversies arising under the Constitution and laws of the United States.

Viewed against this background, the Act was but one more addition to the arsenal of burdens and constraints imposed upon the judges of the inferior courts, primarily upon those who set on the federal trial courts. The question whether these burdens were necessary and proper is fairly debateable.[30] In the present case, however, Judge Hastings has endured them, and the only issue is whether the Senate will accord him now the protections that can only be accorded by a plenary trial before the full Senate. Against that background, he submits that the Senate should and, in fairness, must afford him that modest redress.

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[28] Codified as applicable to judges at 28 U.S.C. App. 427 (1982).

[29] Codified at 18 U.S.C. § § 3161 et seq. (1982).

[30] Hastings v. Judicial Conference, supra, 770 F.2d at 1104-11 (Edwards, J.) 829 F.2d at 109-11 (Buckley, J.); see also Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Yale L.J. 1117 (1985).

Conclusion

The Committee should recommend that the pending articles be tried before the full Senate. The accused enters this forum cloaked not only by the traditional presumption of innocence, but also by the unanimous verdict of the jury, the only body to hear the testimony on both sides. The Senate should not accord any official in this position less process than it has accorded as their due to those who have gone before.

The need for a plenary hearing is further enhanced by the political nature of the process that led to the House's action. The House did nothing when the Justice Department publicized the charges and filed the indictment in 1981 The House did nothing after the jury returned its verdict in 1983, notwithstanding the availability of the complete records from the separate trials of Judge Hastings and William Borders. The House did nothing for the four succeeding years. The House only acted when the Judiciary certified its determination to the Speaker. Then the political context changed. When the House acted, it denied the certified judge procedural protections routinely accorded judges in the past and, indeed, denied him procedural rights it has granted to the convicted judge who is now the subject of an inquiry.

Absent action by the judiciary, the House and the American people would have accepted the jury's 1983 verdict, and there would have been no further proceedings. Judge Hastings is now before the Senate because the judicial and executive establishments effectively created the political context that compelled action by the House. It is now for the Senate to determine why Judge Hastings is before it and what should be done to dispose of the accusations that have been made. If the Senate is to perform the role assigned it, all proceedings in the trial of this impeachment should take place before the full Senate and in the view of the American people.

~~(G)~~ HOUSE MANAGERS' RESPONSE TO JUDGE HASTINGS' STATEMENT [20]

I. Response to Judge Hastings' Arguments in Favor of a Full Senate Trial

Judge Hastings argues that the procedures used by the Judiciary, in the course of its investigation pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, and by the House of Representatives, in its impeachment proceedings, were unfair, thereby establishing the need to forgo the use of a Rule XI Committee for receiving testimony.[1] Although the House Managers take no position on the question of whether the Senate should exercise its discretion to appoint a committee pursuant to Rule XI, respondent's argument against the use of a committee is without support. As discussed below, it is entirely untrue that the procedures used were either unfair or less protective of respondent's interests than procedures previously employed. Moreover, as a threshold matter, the process preceding the exhibiting of Articles of Impeachment to the Senate is totally irrelevant to that Body's determination as to how it will conduct an impeachment trial.

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[1] Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Use of a Rule XI Senate Trial Committee to Receive Evidence in this Case [hereinafter "Respondent's Memorandum on Rule XI Committee"] at 7-14.

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[20] The parties were invited, by Senate Rules Committee letter dated September 8, 1988, to respond generally to the comments of the other, as well as to specific matters as set forth in the letter. (See Appendix F for the letter of September 8, 1988.) See also footnote 18.

Finally, the fact that some of the Articles of Impeachment relate to charges that were adjudicated in a criminal trial is irrelevant to the Senate's decision to appoint a Rule XI Committee.

A. The Procedures of the Judiciary and the House of Representatives are Irrelevant to the Senate's Decision to Invoke Rule XI

The fairness, thoroughness, and adherence to precedent in the proceedings of the Judiciary and the House of Representatives are irrelevant to and should have no impact on the Senate trial. When the Senate votes on the 17 Articles of Impeachment, its decision will be based upon the record developed in the Senate, whether received initially by a committee or the full Senate. The Senate conducts proceedings that are fully independent of prior proceedings. The record created in the Investigating Committee of the Eleventh Circuit and the House of Representatives will not form the basis upon which the Senate will deliberate. Rather, the earlier records were compiled in order to permit the Judicial Conference and the House of Representatives to determine, respectively, whether cause existed to refer the matter to the House or to impeach respondent.

Judge Hastings has not indicated why or how reliance on the full Senate to receive testimony will alleviate any alleged harm resulting from the purported improprieties in earlier proceedings. Either the use of a Rule XI Committee is effective and consistent with the Constitution and the Senate's notion of fairness or it is not. The use or non-use of a committee to receive testimony will not, in any event, remedy the alleged transgressions of other institutions.

B. The House Procedures were Fair and Accommodated Judge Hastings' Legitimate Interests

Judge Hastings' attack on House procedures is not only irrelevant, but rests upon a statement of facts that is patently untrue. With respect to his recitation of the procedural history of this case, respondent has grossly misrepresented the record. His distortions with respect to the procedures used in previous impeachments are equally disingenuous.

Respondent asserts that his request to be involved in all phases of the pre-hearing inquiry were "summarily rejected," and that this is at variance with "the role . . . accorded judges in prior impeachment inquiries."[2] In fact, so far as the historical record indicates, participation in the investigatory stage by the respondent has never been allowed,[3] and Judge Hastings cites no authority to the contrary. Nor does he even attempt to articulate a rationale for creating an unprecedented intrusion into the work of a Congressional committee.

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[2] Ibid. at 8.

With respect to the conduct of the public hearings, Judge Hastings' representations are equally misleading. He alleges that the Subcommittee on Criminal Justice refused to call 68 of the 70 witnesses that he had requested.[4] However, respondent fails to tell this Committee two critical facts: First, the vast majority of those witnesses were proffered only to testify as to alleged improper motive or bias in the criminal and judicial investigations; they had no information to offer with respect to the substantive allegations against the judge.[5] Second, in his final witness list,[6] respondent narrowed his request, so that aside from witnesses who fit within the above category, he asked that only three witnesses be called to testify before the Subcommittee. Two were called and did testify. The third witness was unavailable during the time set for hearings. With respect to several other witnesses, the respondent sought to submit written statements in lieu of testimony, which the Subcommittee permitted.[7]

Thus, Judge Hastings' complaint is in essence that the Subcommittee did not call scores of witnesses whose testimony was irrelevant. The issue before the House was whether the evidence was sufficient to warrant Articles of Impeachment. It should also be noted that, notwithstanding the Subcommittee's repeated requests, at no time did respondent make any proffer as to the specific evidence he expected to elicit which would support his allegation of improper motive or bias. Therefore, there was every reason to believe that respondent was on a fishing expedition with no basis for believing that he would be able to adduce any evidence in support of his thesis. The inclusion of such unlikely witnesses as Chief Justice William Rehnquist and former Chief Justice Warren Burger would appear to support this conclusion.

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[3] See discussion on pre-trial discovery, infra.

[4] Respondent's Memorandum on Rule XI Committee at 9.

[5] Judge Hastings' original witness list appears in Appendix III to Hearings: In the Matter of the Impeachment Inquiry Concerning United States District Judge Alcee L. Hastings before the Subcomm. on Criminal Justice of the Com. on the Judiciary of the House of Representatives, 100th Cong., 2d Sess. (1981) at 263-267 [hereinafter "Appendix III"].

[6] Appendix III at 271-289.

[7] Appendix III at 367-71.

In any event, it is clear that the Subcommittee was entirely justified in calling only those witnesses requested by Judge Hastings who had something to say regarding the facts of the case.

Respondent also complains that the Subcommittee did not call "the more than forty witnesses who had testified [at trial] for Judge Hastings."[8] He fails to mention that originally he asked the Subcommittee to call only two of these witnesses, and that even these two did not appear on his final list.[9]

To bolster his argument that he was treated unfairly by the House, respondent asserts that "the procedure employed by the subcommittee represented a *dramatic departure* from precedent, practice, and rule in prior impeachment inquiries and deprived the accused of rights that had been accorded the officeholder in *every* formal inquiry conducted in this century (apart from the inquiry conducted with respect to a convicted Judge Harry Claiborne)." (Emphasis added.)[10]

Judge Hastings' argument is without merit. First, the implication that the respondent is *entitled* to certain procedures or rights in an impeachment inquiry, by virtue of precedent, practice, or rule, is untrue. The history of impeachment demonstrates that each proceeding has been unique, and that no Congress has felt bound to follow the procedures followed in previous cases. The fact that "the process has been used so infrequently and under such widely varying circumstances [has meant] that no uniform practice has emerged."[11] Moreover, to the extent that a respondent was granted any role in the House proceedings, it was a matter of privilege rather than entitlement.

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[8] Respondent's Memorandum on Rule XI Committee at 9.

[9] Appendix III at 271-289. The two witnesses were a trial judge who allegedly knew of other, unrelated "rainmaking" schemes (and whose testimony was excluded as irrelevant by the court), and an FBI agent.

[10] Respondent's Memorandum on Rule XI Committee at 9, n.13.

Second, historically, the procedures employed in prior impeachments have reflected the prevailing notions of fairness at the time of the proceedings. Thus, most of the cases cited in Jefferson's Manual, and relied upon by Judge Hastings,[12] in fact involved ex parte proceedings.[13] That is, in the House, neither the respondent nor his counsel was allowed to participate in the Committee proceedings. Eventually, the right to counsel and, later, the right to appear and question witnesses was permitted, although not consistently.[14]

With respect to twentieth century impeachments, the House afforded Judge Hastings procedures consistent with past practice. He was permitted to attend all hearings, to question witnesses,[15] to call all relevant witnesses, and to make an opening and closing statement. He was invited to testify in his own behalf, which he declined to do. In addition, the House granted Judge Hastings' initial and most pressing demands — that the hearings and the Report of the Investigating Committee of the Judicial Council be made public. Moreover, he was given voluminous evidentiary materials pertaining to the subject of the inquiry.

C. A Prior Jury Verdict is Irrelevant to the Use of a Rule XI Committee

Judge Hastings also argues that the fact that a jury "rejected most of the allegations that the House has made" precludes the appointment of a Rule XI Committee in this case.[16] Accordingly, he concludes that respect for the jury as well as fairness to the accused requires that this matter be heard by the full Senate. It is the position of the House that a jury verdict is irrelevant to the Senate's adoption of procedures.

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[11] Staff of House of Representatives Comm. on the Judiciary, 93rd Cong., 1st Sess., Selected Materials 707 (Comm. Print 1973).

[12] Constitution, Jefferson's Manual, and Rules of the House of Representatives, H.R. Doc. No. 279, 99th Cong., 2d Sess., § 606 (1987), cited by reference in Respondent's Memorandum on Rule XI Committee at 9, n.13.

[13] Ibid.

[14] Ibid.

[15] Although time limits on questioning witnesses initially were stated, respondent's requests for additional time were granted without exception. Report to H. Res. 499, 100th Cong., 2d Sess., 11 (1988).

Judge Hastings argues that in presenting Articles of Impeachment against him, the House is asking the Senate to readjudicate allegations decided by a jury and to impeach that jury's verdict. Respondent misstates the role and purpose of the Senate trial in an impeachment proceeding. The evaluation of the evidence by the Senate and its determination of the facts in this matter is not a "readjudication" of the allegations made in respondent's criminal trial. Rather the Senate's consideration of these matters serves an entirely different purpose: the determination whether by his conduct Judge Hastings is guilty of an impeachable offense which therefore warrants his removal from office. This determination, which is the sole responsibility of the Senate, must be made regardless of conclusions reached by a jury as to the criminal guilt or innocence of the respondent.[17] Because of the distinct functions served by the Senate in an impeachment proceeding and a jury in a criminal case, the Senate's determination in an impeachment proceeding neither impeaches nor validates a jury verdict.[18] An impeachment trial is not a criminal proceeding. Neither respondent's life nor liberty are at stake. Accordingly, to the extent that respondent suggests he is "cloaked . . . by the traditional presumption of innocence . . . ",[19] he is incorrect.

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[16] Respondent's Memorandum on Rule XI Committee at 2.

[17] The Senate's determination, in fact, is not linked in any way to a criminal prosecution. Neither a criminal trial nor a criminal violation is a prerequisite of impeachment.

[18] Indeed, because of the different standards of proof in the two proceedings — a jury verdict stands simply for the proposition that the Government has not proven beyond a reasonable doubt that the defendant committed a criminal offense — the two bodies could reach opposite conclusions without invalidating the determinations of each other. As stated by the Supreme Court,

> . . . [an] acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.

United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1983).

In a different context, the Senate addressed the issue of the effect to be given to a jury verdict in the proceedings on the impeachment trial of former Judge Claiborne. There, the question was posed in the motions of the House Managers for summary disposition of the third Article of Impeachment (alleging that the fact of Judge Claiborne's conviction of two felony offenses was a sufficient basis for impeachment) and the application of the principle of collateral estoppel to certain issues alleged in the first two Articles of Impeachment. Although the Senate never specifically addressed the motions, the Rule XI Committee heard evidence independent of the jury verdict to support each of the allegations in the Articles of Impeachment and the Senate failed to convict on the third Article which alleged that conviction alone was a sufficient grounds for impeachment. In his separate statement Senator Mathias commented that "[i]n this manner, the Senate convincingly recorded its conclusion that it should not delegate the impeachment function to the courts by making removal a further and automatic consequence of a criminal conviction."[20]

For the same reasons, Judge Hastings' argument that fairness to the accused requires the Senate to process the evidence in the same way as the jury also misses the mark. The role of the Senate is to make an independent assessment of whether respondent's conduct warrants impeachment. The jury verdict does not obviate the need for this independent assessment. The fact that the verdict in this case happens to be one of acquittal in no way changes the responsibility of the Senate. Nor should it affect the decision as to which procedures are best suited to carry out the Senate's independent assessment.[21]

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[19] Respondent's Memorandum on Rule XI at 20.

[20] *Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, a Judge of the United States District Court for the District of Nevada*, S.Doc. No. 48, 99th Cong., 2d Sess. 343 (1986).

[21] The irrelevance of the jury verdict is highlighted in this case because the facts supporting five of the Articles of Impeachment (four allegations of perjury and the charge that Judge Hastings improperly disclosed confidential information learned as a result of his supervision of a Title III wiretap) were never presented to a jury. Arguably only five of the remaining twelve Articles (Articles I - V) were decided by the jury which heard the bribery conspiracy allegations.

Judge Hastings also argues that "fundamental fairness" requires a full trial in the Senate because in this case the credibility of the witnesses will be central to the determination of whether to convict on the Articles of Impeachment. The House Managers agree that the credibility of the witnesses will be a factor in the determination of whether respondent should be found guilty of impeachable offenses. That fact does not require the full Senate to hear the evidence in this case. In the impeachment of Judge Claiborne the Senate proceeded by the appointment of a committee to hear the evidence in spite of Judge Claiborne's argument that the case presented an issue of credibility which could not be determined from the printed record. As we have previously stated, ample historical support for the use of a trial committee exists in the impeachment practice of the British Parliament.[22] Further support can be found in the Supreme Court's practice of exercising its authority to try cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party,"[23] by appointing masters to compile an evidentiary record for the Court's disposition.[24]

Thus, the Senate is in no way precluded from determining that the appointment of a Rule XI Committee is appropriate in this matter. In making this determination the Senate might consider the role of demeanor in judging credibility and the availability of videotapes as a substitute for personal observation. However, demeanor is only one of several factors which should be considered in evaluating the credibility of a witness. Certainly the internal consistency of the witness's testimony, the presence or absence of corroboration, and whether the witness has a motive to testify in a certain way are all significant indicators of credibility which can be assessed without observing the witness. The Senate might consider whether review of a videotape is an adequate substitute for observation of live testimony by the full Senate. The advent of sophisticated video equipment provides the opportunity to observe the testimony of witnesses, perhaps even more closely than one could if one attended the hearing at which the testimony was originally offered.

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[22] *See* Response of the House Managers to the August 10, 1988 Letter from the Senate Committee on Rules and Administration [hereinafter "House Managers' Response"] at 6-7.

[23] United States Constitution, Art. III, sec. 2, cl. 2.

[24] *See e.g.*, *South Carolina v. Regan*, 104 S.Ct. 2148 (1984); *Illinois v. Missouri*, 384 U.S. 924 (1966).

(H) JUDGE HASTINGS' RESPONSE TO HOUSE MANAGERS' STATEMENT [21]

8. We continue to hold the firm view that the Senate cannot and should not attempt to delegate responsibility for the receipt of the evidence presented in the trial of this impeachment. Under that view, there would be no occasion to consider the problems incidental to any bifurcation of the receipt of evidence. Were this view rejected, however, we think the managers substantially underestimate the ability of the Senate to assess the relative importance of certain testimony and the relative significance of the various articles of impeachment. The necessary assessment could not, however, be made until the Senate had before the final pleadings and the full list of witnesses the parties anticipate calling. We also think the methods suggested by the managers for keeping the Senators informed simply illustrate the practical and constitutional infirmities of the use of Rule XI committee in this case.

9. Only one of the methods proposed by the managers for keeping Senators informed could materially reduce the unfairness inherent in the use of a Rule XI committee in the trial of this impeachment. The delivery of opening

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[21] See footnotes 19 and 20.

statements by the parties, followed by a replay of a videotape that projected *all* proceedings during which admissible evidence was received by a Rule XI committee, followed by closing arguments before the full Senate would replicate the required trial process as nearly as possible. It would also require all Senators to hear and consider the evidence in a public forum so that the public as well as the accused could be satisfied that the resulting judgment reflected the verdict of Senators who had heard and considered the evidence admitted at trial. We do not, however, think that the minor efficiencies that might be achieved by editing out "tape delays" could justify departures from established practice, departures that would, at a minimum, deprive the accused of the right to confront the witnesses against him in the presence of the jury. The other methods suggested by the managers share fundamental defects that illustrate constitutional doubts that permeate the Rule XI procedure.

10. The use of a Rule XI committee permits the Senate to continue the legislative business simultaneously with the conduct of an impeachment trial. For precisely that reason, it deprives the accused of the attention to the evidence that is afforded by a trial before the full Senate. Individual Senators may, of course, be inattentive during a trial before the full Senate. They cannot, however, claim the excuse that their duty to participate in legislative business being conducted by the Senate, on the floor or in committee, precluded the proper performance of the duties the Constitution imposes upon them as members of the high court of impeachment. Moreover, the ongoing burdens of the legislative business diminishes any prospect that Senators would in reality have time to study and deliberate upon recorded evidence, whether submitted in transcript or videotape form or both. The Senate has not yet developed procedures for expanding the number of hours in the day or days in the week, and it borders upon the frivolous to suggest the Senators presently have excess time sufficient to enable them to read substantial transcripts or view videotapes of extended committee proceedings while they are performing the duties incident to ongoing legislative business.

11. In any event, these methods would impair the right of the public and the accused to hold their elected officials accountable for the proper discharge of their duties in executing the public business. At a public trial before the full

Senate, the public may observe and the media will report the attendance and attention given by the members. There is no comparable record to inform the public concerning the attention given transcripts or videotapes by individual Senators. A public trial before the full Senate provides such assurances as are possible that the resulting deliberations and votes were based upon the evidence and arguments presented at trial, rather than upon secondary accounts or briefings given in private by staff or, worse, by those with an interest in the outcome.

12. As the managers suggest,[11] bifurcation of the pretrial proceedings and the trial proceedings may be appropriate. A Senate committee might play a significant role in the pretrial proceedings that would aid the Senate in conducting a fair and orderly trial without any unnecessary consumption of time or delay. Such a committee might usefully be employed to conduct proceedings necessary to develop a record upon which the Senate could properly consider pretrial motions. Such a committee might usefully be employed in resolving disputes over discovery and assuring that Judge Hastings is afforded access to the records necessary to enable him to prepare for trial. Such a committee might usefully be employed to conduct proceedings necessary to establish the authenticity of documents and to create a record upon which the Senate might determine significant evidentiary questions, such as those likely to arise from the House's planned use of a "linguistics expert" to express expert opinions on how the Senators should interpret a brief recorded telephone conversation between Judge Hastings and Mr. Borders.[12]

13. Although we agree that the Senate may find it useful to designate a committee to conduct certain pretrial proceedings, we do not believe that the Senate should undertake to designate its members or define its role until the pleadings have closed and the issues to be addressed have been defined by the pretrial motions presented by the parties. In the absence of the House or any managers authorized to act on its behalf, such a committee could not, in any event, act after the adjournment of the 100th Congress. When the 101st Congress convenes and the Senate has the parties' motions and the managers appointed by the new House before it, the Senate may then better determine what functions, if any, might properly be delegated to a pre-trial committee and which Senators should be designated to serve.

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[11] Managers Mem. at 5 and 8 (recognizing distinction, but improperly suggesting pretrial proceedings may continue after adjournment of 100th Congress).

[12] Managers Mem. at 11 (identifying Professor Roger Shuy as an anticipated witness).

(I) COMMENTS OF CONGRESSIONAL RESEARCH SERVICE [22]

USE OF COMMITTEE

The second question which the Senate requested the Committee on Rules and Administration to study was "the appropriate use, in the pending impeachment, of Senate Impeachment Rule XI."[36]

The rule and its history. Under rule XI, in an impeachment trial, the Senate may order the presiding officer to appoint a committee of Senators "to receive evidence and take testimony...." For this purpose, the committee and its chairman exercise all the powers of the Senate under the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials. The committee is to report to the Senate in writing by means of a certified copy of the transcript of the proceedings and testimony given before the committee and "such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate...." The rule specifies that it does not bar the Senate "from sending for any witness and hearing his testimony in open Senate...." The rule also reserves the right of the Senate to order that the entire trial be conducted before the full Senate.

Rule XI was adopted on May 28, 1935.[37] The 1935 resolution was identical to one reported in 1934 in the previous Congress, but which was not adopted

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[36] 134 Cong. Rec. S 11170 (daily ed. August 9, 1988).

[37] 79 Cong. Rec. 8309-10 (1935).

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[22] Submitted on August 30, 1988, by Jay R. Shampansky, Esq., Legislative Attorney, American Law Division, Congressional Research Service, The Library of Congress, Washington, D.C. 20540.

then because debate was cut short on the measure.[38] The rule was intended to permit the Senate to provide for the appointment of a committee of Senators "who would go into the country and take the testimony rather than bring the witnesses to the Senate....The committee would make no recommendations or conclusions and issue no report to the Senate except the certified copy of the transcript."[39] In preparation for the 1986 Claiborne impeachment trial, the Senate adopted a series of amendments to its impeachment rules, including two minor amendments to rule XI.[40] First, to make it clear that when it is desired to have a committee take evidence, it must be ordered by the Senate, the phrase "if the Senate so orders" was substituted for the former language, "upon the order of the Senate."[41] And second, the former requirement specifying that the committee be composed of twelve Senators was deleted so as to leave the committee's composition to be set by the Senate "in accord with the needs of the situation."[42]

The Claiborne Impeachment. The rule XI procedure was apparently not employed in the 1936 impeachment proceedings against Judge Halsted Ritter, but was first utilized in the proceedings against Judge Harry Claiborne. The Senate on August 14, 1986, adopted a resolution authorizing the presiding officer to appoint a committee of twelve Senators to receive evidence and take testimony. The majority and minority leaders each recommended six Members to the presiding officer.[43] Claiborne's lawyer, Oscar Goodman, filed with the Impeachment Committee a pre-trial motion to declare rule XI unconstitutional, and argued that the trial function could not be delegated to a committee.[44] The committee chairman, Senator Mathias, ruled that the committee lacked authority to grant or deny the motion and instead determined that the motion would be referred to the Senate when the committee reported the evidence that it had received.[45] Goodman renewed his motion before the Senate,[46] which, following argument by Goodman[47] and Rep. Hughes, a manager for the House,[48] agreed to a motion by Senators Heflin and Warner to postpone the decision on this and several other motions made by Goodman until the conclusion of the presentation by the managers and the defendant.[49] The Senate subsequently considered the motion concerning rule XI in closed session[50] and when the Senate resumed its proceedings in open session it adopted, by a vote of 61 to 32, a motion offered by Senator Dole that the Senate not hear additional witnesses in the case.[51] The decision of the Senate not to hear any additional witnesses[52] was apparently an implicit rejection of Goodman's motion to declare rule XI unconstitutional, since without hearing witnesses itself, the Senate would have had to rely on the evidence and testimony received by the committee. Senator Specter, in a statement following the Senate vote to impeach Claiborne, indicated that the vote on the Dole motion was a response to Goodman's motion to declare rule XI unconstitutional.[53]

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[38] The history of the rule up to 1974 is summarized in a September 3, 1974, CRS report, "Evolution of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials," by Robert Thornton. The report is reprinted in S. Rept. No. 93-1125, 93d Cong., 2d Sess. 54, 63-66 (1974).

[39] S. Rept. No. 93-1125, supra, at 65.

[40] S. Res. 479, 99th Cong., 2d Sess., 132 Cong. Rec. S 11902 (daily ed. August 15, 1986).

[41] S. Rept. No. 99-401, 99th Co[illegible] Sess. 5 (1986).

[42] Id.

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[43] S. Res. 481, 99th Cong., 2d Sess., 132 *Cong. Rec.* S 11673 (daily ed. August 14, 1986).

[44] *Hearings Before the Senate Impeachment Trial Committee*, 99th Cong., 2d Sess. (1986), Part 1 at 240 (motion), 83 *et. seq.* (argument of counsel). See also *id.* at 460-61 (House motion in opposition to Claiborne rule XI motion).

[45] *Id.* at 112-13.

[46] 132 *Cong. Rec.* S 15485 (daily ed. Oct. 7, 1986).

[47] *Id.*

[48] *Id.* at S 15487.

[49] *Id.* at S 15491.

[50] 132 *Cong. Rec.* S 15557 (daily ed. October 8, 1986). See also 1986 *Cong. Quarterly Almanac* at p. 80.

In last-minute court appeals, Claiborne sought to restrain the Senate from voting on his impeachment, challenging, *inter alia*, the use of the committee to take testimony. In apparently unreported, brief orders, the courts declined to grant Claiborne the relief he sought.[54]

Analysis. As noted above, questions concerning the constitutionality of rule XI were raised during the Claiborne impeachment proceedings. The pertinent constitutional provision is art. I, § 3, cl. 6, which states: "The Senate shall have the sole power to try all impeachments....And no person shall be convicted without the concurrence of two thirds of the Members present." On the one hand, it might be argued, as Claiborne's counsel urged, that this provision vests in the full Senate the responsibility for trying an impeachment, and the Senate is not authorized by the provision to delegate this responsibility to a committee.[55] "The one who decides must hear"[56] and, according to this argument, as the trier of fact, each Senator must be familiar with the evidence, and it is impermissible to use a committee as a "filtering" device to receive evidence that is then submitted to the full Senate.[57] Furthermore, it is particularly important for each Senator to hear the evidence in a case that may turn on the credibility of witnesses.[58] On the other hand, it might be argued, as did the House managers in the Claiborne case, that apart from the requirement of a two-thirds vote for conviction, the Constitution does not specify the particulars of an impeachment trial and the Senate has inherent authority, as the trier of fact, to establish rules governing the manner in which evidence is to be received. Setting up a committee to receive evidence is arguably within the discretion of the Senate.[59] And in the Claiborne case, the House managers argued that it was not always necessary for the trier of fact to see and hear a witness' testimony in order to determine his credibility since credibility might be judged on other factors, such as documentary evidence or inconsistent statements. Finally, in the Claiborne case, a video tape was available for Senators who wanted to review the testimony of witnesses.[60]

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[51] 132 *Cong. Rec.* at S 15557.

[52] In response to a question by Senator Levin as to whether Dole's motion barred "*any* additional witnesses", Senator Dole responded in the affirmative. *Id.* (emphasis added).

[53] 132 *Cong. Rec.* S 15767 (daily ed. October 9, 1986).

[54] Claiborne challenged the Senate's procedure in the U.S. District Court for the District of Columbia, which ruled against him on October 8, 1986. See 132 *Cong. Rec.*, S 15767 (daily ed. October 9, 1986) (remarks of Senator Specter). An emergency appeal to the U.S. Court of Appeals for the District of Columbia was denied and, finally, both Chief Justice Rehnquist and Justice Marshall denied his request for a stay of the Senate proceedings. *Claiborne v. United States*, No. A-275 (U.S. October 9, 1986). See also 44 *Cong. Quarterly* 2569 (October 11, 1986).

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[55] See Hearings Before the Senate Impeachment Trial Committee, supra note 44, Part 1 at 240; 132 Cong. Rec. S 15485-87 (daily ed. October 7, 1986).

[56] Morgan v. United States, 298 U.S. 468, 481 (1936).

[57] 132 Cong. Rec. at S 15485.

[58] Hearings Before the Senate Impeachment Trial Committee, supra note 44, Part 1 at 242.

[59] Id. at 460-61.

[60] 132 Cong. Rec. S 15487 (remarks of Rep. Hughes).

Following the Senate action in voting to convict Claiborne on three of the four articles of impeachment exhibited against him by the House, one Member indicated that, in his view, the rule XI procedure was acceptable in the Claiborne case since Claiborne had been convicted in the courts on the basis of the same key facts underlying the offenses for which he was impeached. However, the Member expressed "serious doubts" about the use of the rule XI procedure if factual determinations crucial to the articles of impeachment had not previously been established by a court.[61] Thus, the arguments against the rule XI procedure may possibly be stronger in a case like that of Judge Hastings, who has been acquitted in a criminal trial, than in a case such as that of Judge Claiborne, who had been convicted in a criminal prosecution.

There appears to be a split of authority as to British precedents concerning the use of committees in impeachment proceedings. A memorandum prepared in 1986 at the request of the Senate Legal Counsel by the Law Library of the Library of Congress concluded that the examples it cited "support the conclusion that while a trial of impeachment was held before the full House of Lords, examination of witnesses was sometimes conducted by a committee of the House in preparation of the trial."[62] However, in his treatise on impeachment, Raoul Berger states:

> No trace of a reference to a committee of the Lords for hearing of the evidence turned up in my search of impeachment proceedings. The reason appears in a statement made by the Managers of the Lords at a conference between

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[61] 132 Cong. Rec. S 15762-63 (daily ed. October 9, 1986) (remarks of Senator Bingaman).

[62] "Taking of Evidence Before a Committee of the House of Lords During Impeachment Proceedings", by Kersi Shroff, Senior Legal Specialist, American-British Law Division, Law Library, Library of Congress (Sept. 1986), reprinted in Hearings Before the Senate Impeachment Trial Committee, supra note 44, at 87-9.

> members of the Lords and the Commons (reported January 18, 1691) that "In the case of impeachments, which are the groans of the people...and carry with them a great supposition of guilt than any other accusation, there all the Lords must judge."[63]

Berger acknowledges that the American impeachment process, unlike that in England, is not criminal in nature,[64] but asserts that English procedure should nevertheless provide the model for our impeachment proceedings.[65]

By way of analogy, it may be noted that both the House and Senate have delegated to committees the responsibility for receiving evidence and taking testimony for a variety of purposes. Bills, of course, are routinely referred to committee for consideration,[66] and a committee in holding legislative or oversight hearings may take testimony and compel the attendance of witnesses and the production of documents.[67] But, more importantly for present purposes, committees also receive evidence and take testimony where the House or Senate is performing a quasi-judicial function. In cases of exercise of the inherent contempt power, although generally the proceedings appear to have been conducted at the bar of the House of Congress involved, in at least a few instances proceedings were conducted either initially or primarily before a committee, with the final decision as to whether to hold the person in contempt being made by the full House.[68]

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[63] Berger, Impeachment: The Constitutional Problems 171 (1973), citing and quoting 4 Hatsell, Precedents of Proceedings in the House of Commons 343, 333, 342 (1796). For a more detailed treatment of English precedents, see Williams, The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials, 50 N.Y.U.L. Rev. 512 (1975).

[64] Berger, *supra*, at 170, 171.

[65] *Id.* at 171-72.

[66] Senate rule XIV, cl. 3; House rule X, cl. 1.

[67] Senate rule XXVI, cl. 1; House rule XI, cl. 2(m).

Although Art. I, § 5, cl. 2, of the Constitution specifically vests in "each House" the authority to "punish its Members for disorderly behavior, and, with the concurrence of two thirds, expel a Member," nevertheless both the House and Senate have delegated to committees substantial responsibilities in regard to this constitutional duty. The Senate Select Committee on Ethics is to "receive complaints and investigate allegations of improper conduct...and...make appropriate findings of fact and conclusions with respect thereto [and] recommend to the Senate... [appropriate] disciplinary action...."[69] The Senate Ethics Committee is specifically authorized to hold hearings, to take testimony, and to compel the attendance of witnesses and the production of documents.[70] Similarly, the House Committee on Standards of Official Conduct is authorized "to investigate...any alleged violation, by a Member, officer, or employee of the House, of the Code of Official Conduct or of any law, rule, regulation, or other standard of conduct applicable to the conduct of such Member, officer or employee..., and after notice and hearing, to recommend to the House...such action as the Committee may deem appropriate...."[71] The House Committee on Standards of Official Conduct, like other standing committees of the House, may take testimony, and compile the appearance of witnesses and the production of documents.[72]

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[68] For example, in 1865, the House appointed a select committee to inquire into an alleged breach of privilege committed by Mr. A.P. Field for assaulting a member of the House. Cong. Globe, 38th Cong., 2d Sess. 371 (1865). After taking testimony, the committee recommended, and the House adopted, a resolution directing the Speaker to reprimand Field at the bar of the House. Id. at 971, 974.

In a case involving a due process challenge to the procedure employed by a state legislature in a contempt proceeding, the U.S. Supreme Court observed that "the customary practice in Congress has been to provide the contemnor with an opportunity to appear before the bar of the House, or before a committee, and give answer to the misconduct charged against him." Groppi v. Leslie, 404 U.S. 496, 501 (1972) (emphasis added).

[69] Senate Manual, 100th Cong. § 79

[70] Id.

While Article I, § 5, cl. 1 specifically authorizes "each House" to "be the judge of the elections, returns and qualifications of its own Members," in both the House and Senate, committees play critical roles in contested election cases. A statutory provision authorizes the Committee on House Administration to hear contested election cases "on the papers, depositions, and exhibits filed with the Clerk."[73] Acting upon reports of the committee, the House then disposes of the case.[74] In the Senate, the procedure for handling contested election cases varies somewhat from case to case,[75] but "resolutions and petitions of contest are usually referred today either to the Committee on Rules and Administration...or to the Select Committee on Standards and Conduct...."[76] The full Senate can act upon a resolution reported by the Committee.[77]

Conclusion. Senate impeachment rule XI was adopted in 1935 and was first employed in the Claiborne impeachment in 1986. In that case, the Senate rejected constitutional challenges to the rule, but one member had serious doubts about the use of a committee in a case in which the key factual determinations underlying the articles of impeachment had not been previously established by a court.

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[71] House rule X, cl. 4(e)(1).

[72] See House rule XI, cl. 2(m).

[73] 2 U.S.C. § 392(a).

[74] Deschler's Precedents, vol. 2, Ch. 9, § 2.

[75] See Senate Election, Expulsion and Censure Cases from 1793 to 1972, S. Doc. No. 92-7, 92 Cong., 1st Sess., at vii, viii (1972).

[76] Id. at viii. (In 1977, the Senate Select Committee on Standards was replaced by the Select Committee on Ethics.)

[77] See Riddick, supra note 15, at 559.

The use of a committee to receive evidence in an impeachment case would generally seem to be consistent with the practice of both the House and Senate of directing committees to receive evidence and testimony to assist the full body in performing quasi-judicial functions.

(J) PARTIES' COMMENTS RE PROPOSED WITNESSES

The Committee believes it would be helpful in its consideration of the issue of appropriate use of Rule XI in the pending impeachment that it have more detailed information regarding the intentions of the parties as to witnesses. The parties were requested, therefore, to include in their statements their tentative intentions regarding the witnesses they plan to call in the Senate trial, whether it be before the full Senate or an impeachment committee. Their statements follow.

(1) Statement of House managers [23]

With respect to the number of witnesses the House Managers intend to call, the nature of their testimony, and the amount of time required for the presentation of the case of the House of Representatives, the House Managers must emphasize the tentative nature of this response. The composition of the witness list, the number of witnesses, and the testimony sought to be elicited from a particular witness are all subject to revision as trial approaches and, indeed, even in the course of trial. With this cautionary note in mind, the House Managers estimate that 10 to 12 trial days will be required to present the case on behalf of the House of Representatives. The Managers anticipate that the following witnesses will be called at trial.

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[23] See footnote 18.

1. Hemphill Pride. Mr. Pride will testify about the events of October 9, 1981; his lack of knowledge of a letter writing campaign by Judge Hastings on his behalf; and that he did not have access to particular phones identified by Judge Hastings at the judge's criminal trial.

2. William Murphy. Mr. Murphy was the FBI agent in charge of the investigation into the bribery conspiracy. He will testify about the investigation, including the FBI's attempts to interview Judge Hastings on October 9,1981.

3. H. Paul Rico. Mr. Rico is a former FBI agent who acted in an undercover capacity as Frank Romano. He will testify about his contacts with William Borders.

4. John Simmons. Mr. Simmons was the FBI agent who interviewed Judge Hastings in Florida late in the evening on October 9, 1981. He will testify to the details he learned regarding Judge Hastings' actions after the judge returned to Florida from Washington, D.C.

5. Jeffrey Miller. Mr. Miller is a former law clerk to Judge Hastings. He will testify to facts surrounding the drafting and issuance of the forfeiture orders in the case of United States v. Romano.

6. Daniel Simons. Mr. Simons is a former law clerk to Judge Hastings. He will testify about the issuance of the October 6, 1981 forfeiture order in the case of United States v. Romano.

7. Shirley Ross. Ms. Ross was Judge Hastings' date on September 11, 1981 in Washington, D.C. She will testify about the circumstances of Judge Hastings' arrival at her home that evening.

8. Donna Myrill Mendez. Mrs. Mendez was present at the Sheraton Hotel on September 12, 1981, with Judge Hastings and others. She will testify about the events of that evening.

9. Pearl Dabreau Mapp. Mrs. Mapp was present at the Sheraton Hotel on September 12, 1981, with Judge Hastings and others. She will testify about the events of that evening.

10 Madeline Petty. Ms. Petty accompanied William Borders to

the Leonard-Hearns championship fight in Las Vegas, Nevada on September 16, 1981. She will testify about the trip and its planning.

11. Essie Thompson. Ms. Thompson accompanied Judge Hastings to the Fontainebleau Hotel on September 16, 1981. She will testify about that evening.

12. Wendy Loucks. Ms. Loucks was one of the FBI agents that surveilled the Fontainebleau Hotel on September 16, 1981. She will testify about what she observed that evening.

13. Carolyn McIver. Ms. McIver is a social friend of Judge Hastings residing in Columbia, South Carolina. She will testify that Judge Hastings could not have reached Hemphill Pride at her telephone number, contrary to Judge Hastings' testimony at trial.

14. Andrew Chisholm. Mr. Chisholm is a resident of South Carolina. He will testify that William Borders could not have reached Hemphill Pride at Mr. Chisholm's telephone number, contrary to Judge Hastings' testimony at trial.

15. Eleanor Golar-Williams. Ms. Golar-Williams is the former mother-in-law of Patricia Williams, one of Judge Hastings' counsel. She will testify that Judge Hastings could not have reached Hemphill Pride at her telephone number, contrary to Judge Hastings' testimony at trial.

16. Roger Shuy. Professor Shuy, of Georgetown University, is a linguistics expert. He will testify that Judge Hastings and William Borders engaged in a coded conversation on October 5, 1981.

17. Senora Avery (or substitute). Ms. Avery will describe how a Hobic computer records telephone calls made from hotel rooms.

18. Airline Records Specialist. This witness will explain the information contained on airline reservation histories.

19. Stephen Clark. Mr. Clark is Mayor of Dade County, Florida. He will testify that Judge Hastings disclosed to him confidential information, which other witnesses will establish was obtained through a Title III wiretap.

20. Roberto Martinez. Mr. Martinez was the Assistant United States Attorney who applied for authorization for a Title III wiretap from Judge Hastings and presented subsequent progress reports to the judge. He will testify that Judge Hastings expressed a particular interest in the information contained in the reports that Kevin "Waxy" Gordon was talking about Mayor Clark. Mr. Martinez also participated in the decision to terminate certain undercover investigations as a result of the disclosure of confidential information.

21. Christopher Mazzella. Mr. Mazzella was the FBI agent in charge of the public corruption unit in Miami, Florida. He will testify about the undercover investigations for which the wiretap was authorized, the investigation of the wiretap leak and his attempt to interview Judge Hastings.

22. Geoffrey Santini. Mr. Santini was the FBI case agent for the undercover investigations for which the wiretap was authorized. He will testify about presenting Judge Hastings with an application and affidavit to extend the wiretap, at which time the judge commented to the affect that "Waxy" Gordon was going to get Mayor Clark in trouble by talking so much.

23. Monsignor Bryan Walsh. Monsignor Walsh attended the Metropolitan Miami Action Plan meeting during which Judge Hastings disclosed the wiretap information to Mayor Clark. Monsignor Walsh will testify that Mayor Clark and Judge Hastings were together with him prior to Judge Hastings' speech on the morning of September 6, 1981.

The House Managers must emphasize that the foregoing list is not exhaustive. In the course of compiling the list, additional witnesses were considered and not set forth because it is not the House Managers' present intention to call them. This judgment, however, may change depending on how the trial progresses.

In addition, it is not the House Managers' present intention to call any witness who could legitimately invoke any evidentiary or constitutional privilege. This is also only a preliminary determination and might be reconsidered at a later date.

(2) Additional statement of House managers [24]

At this time, the House Managers update their witness list by adding the following persons:

1. Martha Rogers. Ms. Rogers was one of the Assistant United States Attorneys, in Miami, Florida, who first learned of the bribery scheme between William Borders and Judge Hastings. She will testify about the investigation of the conspiracy.

2. Neal Sonnett. Mr. Sonnett was a defense attorney in United States v. Romano. He will testify about matters relating to the Romano case.

3. James Deichert. Mr. Deichert was the Assistant United States Attorney who prosecuted United States v. Romano. He will testify about matters relating to the Romano case.

4. Patricia Thomas. Ms. Thomas is Special Projects Administrator for the Metro Miami Action Plan ["MMAP"]. She will testify about the MMAP annual meeting that was held on September 5 and 6, 1981.

5. Brian Duffy. Mr. Duffy is a former reporter for The Miami Herald. He will testify about his discussions with Judge Hastings about the grand jury that had convened to investigate the possible disclosure of wiretap information.

6. Eric Holder. Mr. Holder is an attorney in the Public Integrity Section of the Department of Justice. He will testify about his conversation with Judge Hastings in May 1985 regarding the disclosure of confidential wiretap information.

The House Managers again emphasize that the number of witnesses that will be called, the nature of their testimony, and the amount of time required for the presentation of the case on behalf of the House of Representatives may alter as trial approaches and even during trial. For example, revisions may be necessary once Judge Hastings submits his list of witnesses and as the trial proceeds. With this cautionary note in mind, the House Managers estimate that 12 to 15 trial days will be required to present the case of the House of Representatives.

In addition, it remains the House Managers' present intention not to call any witness who is anticipated will invoke any evidentiary or constitutional privilege.

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[24] Submitted by Alan I. Baron, Special Counsel to Managers of the House of Representatives.

Managers of the House of Representatives (101st Congress): Jack Brooks, John Conyers, Jr., Don Edwards, John Bryant, Hamilton Fish, Jr., and George W. Gekas.

Impeachment Trial Staff (101st Congress): Alan I. Baron, Special Counsel; Janice E. Cooper, Assistant Special Counsel; Patricia Wynn, Assistant Special Counsel; and Lori E. Fields, Assistant Special Counsel.

House Judiciary Committee Staff Participating in Impeachment Trial Preparation (101st Congress): William M. Jones, General Counsel; Alan F. Coffey, Jr., Chief Associate Counsel; Daniel M. Freeman, Counsel; Peter Levinson, Associate Counsel; and Raymond V. Smietanka, Associate Counsel.

(3) Statement of Judge Hastings [25]

Basic fairness, as well as precedent, dictate that the House should be required to disclose the names of the witnesses it intends to call before the accused is required to decide and report the witnesses whom he or she will call in response.[31] Nonetheless, we recognize that the Senate needs to plan for the proceedings that will be necessary to dispose of the pending articles and that the Committee properly seeks any information that may aid it in formulating recommendations that may assist the Senate. We offer the following preliminary estimates with that in mind.

1. *The Witnesses and the Nature of Their Testimony:* Absent prior specification by the House, it is impossible and would be inappropriate for Judge Hastings to determine or specify the witnesses he may call for his defense. Nonetheless, the fact that fifteen of the articles concern matters that were the subject of the 1983 trial makes it possible to

[31] *See, e.g.*, *Impeachment Procedure* 182 (precedent noted).

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[25] See footnote 19.

forecast the kinds and number of witnesses that may be necessary. In our present view, the necessary witnesses fall into four categories:

a. Almost sixty witnesses testified at the 1983 trial -- seventeen for the prosecution and more than forty for the defense. Judge Hastings would anticipate that he would call a comparable number of witnesses in his defense to the first fifteen articles and might have to call some of the prosecution witnesses, if they were not called by the House. The particular witnesses called might well differ from those called in 1983 in view of the passage of time and the particular witnesses chosen by the House, but the aggregate number is unlikely to vary significantly. Through the post-trial investigations by the judiciary and the House, in so far as we are aware, only five additional witnesses who could competently testify to arguably relevant facts have been identified. Judge Hastings does not believe that the testimony that could be supplied by these witnesses would require him to call more than a few additional witnesses in response.

b. The post-trial investigations have made it clear that Judge Hastings should have been permitted to call witnesses in support of his "rainmaking" defense. At that, trial Judge Hastings sought to compel the government to produce its informant, William Dredge, and also sought to introduce evidence to show that all judges were vulnerable unfounded claims made by a few corrupt lawyers. Such lawyers, "rainmakers" as they were styled, make unfounded claims that they have the power to fix a case before a judge in exchange for a bribe in order to extract exorbitant amounts from an unsuspecting client.

The prosecution opposed the production of Dredge, representing that he was unavailable and that he had no material information. The trial judge upheld that objection. The prosecution objected to introduction of the "rainmaking" defense, and the trial judge ruled that Judge Hastings would not be permitted to use the defense or offer evidence in support of it, unless he could first prove that Borders had also held himself out having the power to fix cases before judges other than Judge Hastings. Judge Hastings was unable to satisfy the conditions imposed by the judge, and his rainmaking evidence was excluded.

The hearings before the five-judge committee that conducted the post-trial investigation demonstrated that Borders had held himself out as having the power to fix cases before other judges and that the prosecutors had known this when they objected at the 1983 trial. The government produced Dredge for the five-judge committee, and Dredge testified that Borders had indeed claimed that he had the power to fix cases before judges other than Judge Hastings. The government has since acknowledged that, prior to the trial, the FBI had conducted at least one investigation concerning Borders's claims with respect to another judge.

On this basis, Judge Hastings expects to ask the Senate to compel the production and testimony of William Dredge and to introduce testimony concerning "rainmaking" comparable to that which was excluded at his trial. We estimate that this would require the testimony of an additional three-to-five witnesses.

c. Judge Hastings cannot estimate the number of witnesses, other than himself, from whom testimony concerning the allegations set out in article XVI would be required with any confidence. At prior hearings, however, he has deemed his testimony and that of one or two additional witnesses sufficient. At a trial on this article, he would not anticipate that the number of witnesses he would call exceed the number called by the House.

d. The Senate may have to exercise its subpoena and contempt power to obtain the testimony of two witnesses whose testimony would aid judge, but who may be difficult to locate or reluctant to testify or both. As part of its plea bargain, the Justice Department agreed that William Dredge would not have to testify before any forum. At trial, the prosecutors claimed that they were unaware of his whereabouts and that he had no material information. He was, however, produced for the five-judge committee, apparently by FBI agent William Murphy. Mr. Dredge was forced to testify, and his testimony provided crucial missing links supporting several of the judge's claims. The Senate may have to subpoena FBI agent William Murphy or John Doar to determine the location of Mr. Dredge.

William Borders is a central witness. If he agreed to and did testify truthfully, his testimony would fully exonerate the judge. He refused to testify before the House subcommittee, and the subcommittee declined to pursue the matter. To date, Mr. Borders has refused to testify before any forum concerning the accusations made in the 1981 indictment and restated in the House's 1988 articles.[32]

Assuming that the House sought to prove its allegations by calling those witnesses who can competently testify to relevant facts, we anticipate that much of the information necessary to the judge's defense could be elicited through cross-examination. Moreover, there will be some duplication among the witnesses in the categories identified above, which should make it feasible for Judge Hastings to reduce the total number further. In that event, the number of witnesses necessary for the defense might be substantially fewer than the number indicated by the foregoing estimates. On this assumption, we believe that the aggregate number of witnesses called by the defense may be fewer than forty.

2. *Time*: Again, we are handicapped by a lack of information from the House. At present, we believe the direct testimony and other evidence in support of Judge Hastings's defense to all the allegations would be unlikely to consume more than forty to fifty hours of trial time and might less. In part, this estimate may depend upon the scope and extent of the information that is provided by the House before the trial and that the judge is permitted to develop through cross-examinations of witnesses called by the House during the trial.

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[32]. See Impeachment Report at 11-12 (for a summary).

(4) Additional statement of Judge Hastings[26]

14. We have provided the Rules Committee with our considered estimates of the number of witnesses likely to be necessary for Judge Hastings's defense and of the amount of time their testimony is likely to require at trial. The records from the 1983 trial identify the witnesses called at that time. In response to a similar request from the House subcommittee during its hearings, we provided a comprehensive list that identified the universe of persons from whom we then thought testimony material to his additional defenses might be obtained and submitted memoranda identifying the points he sought to establish and the specific witnesses from whom the necessary testimony might be elicited.[18] Judge Hastings has made substantial disclosure, and the materials containing that disclosure should be available to the Rules Committee.

15. The procedures employed by the House subcommittee and the absence of discovery make it inappropriate, in counsel's view, for Judge Hastings to attempt to further specify witnesses he may call at this time. The House committee has not afforded Judge Hastings access to materials from which he might assess the need for and value of testimony that could be supplied by many of the potential witnesses. Moreover, information we have supplied to the House in the past has invariably been used to aid the House in developing a case against Judge Hastings. Never has the House used it for the purposes for which it had been requested or submitted -- to pursue avenues of inquiry or to permit the development of evidence that might support the judge's claim that he is an innocent victim. It is not Judge Hastings's job to aid his accusers in improving a case developed through a process that, in his view, has been and remains fundamentally unfair. Against that background, counsel for Judge Hastings do not believe disclosure beyond that previously given can fairly be requested or made at this stage of the proceedings.

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[18] *Hearings App.* III at 261-67, 271-89 (list and memoranda specifying testimony sought).

(K) COMMITTEE'S FINDINGS AND RECOMMENDATIONS

1. The Senate has authority to use a committee pursuant to rule XI of the Senate Impeachment Rules

The recent proceedings against Judge Harry Claiborne, in 1986, resolved any doubt about the validity of Rule XI of the Senate Impeachment Rules. In that case, both the Senate and the federal courts rejected challenges to the use of the rule.

Implementation of the rule in the Claiborne case was consistent with the pertinent constitutional provisions found in article I, §3, cl. 6, which give the Senate, ". . . sole Power to try all Impeachments . . ." and the Senate's power to determine the rules of its proceedings, granted by article I, §5, cl. 2 of the Constitution. These express grants of constitutional authority appear to give the

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[26] See footnote 19.

Senate plenary authority to enact rules for trials of impeachments. It is reasonable for the Senate to employ a committee in an effort to manage the process of obtaining evidence and witnesses' testimony for the review by the whole Senate. Indeed, in other contexts, the Senate routinely relies upon committees to receive evidence.

As was explained in the discussion of the historical background of the rule, Rule XI is also consistent with British impeachment practice in the House of Lords. As Jefferson noted in his *Manual,*

> The practice is to swear the witnesses in open House, and examine them there; *or a committee may be named, who shall examine them in committee either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand.*[27]

The Committee's conclusion that the Senate may use a Rule XI committee to take testimony and receive evidence in an impeachment trial is supported by the Congressional Research Service and the House Managers. The House Managers state, "The House Managers are of the view that the appointment of a committee in an impeachment proceeding is a matter within the Senate's sound discretion." Respondent challenges the constitutionality of the rule but focuses his arguments on the issue of whether the rule should be applied in this particular case.

As the forgoing discussion shows, the Senate has the authority to appoint a Rule XI committee.

2. The Senate should appoint a committee in the pending impeachment pursuant to Impeachment Rule XI

The committee finds that the right of the parties to a fair proceeding will best be served through the use of a Rule XI committee. Use of a committee to take evidence will permit twelve Senators to devote their attention to the evidence throughout the course of the parties' presentation; it will ensure that the parties have a full opportunity to present their cases while, at the same time, the legislative work of the nation is carried on.

The parties have submitted estimates of the number of witnesses and amounts of time necessary to present their cases. The Managers have identified twenty nine witnesses and estimate that it will take twelve to fifteen full days to present their case.

In his September 1988 statement, respondent indicated that he might call more than forty witnesses and may take some forty to fifty hours to present his case. At the Rules Committee hearing on January 26, 1989, however, counsel for Judge Hastings indicated that he will need as much time to present his case as the Managers require to present theirs. The additional time needed to argue motions and to open and close the case make it likely that the trial will take at least a month.

It is obvious that the full Senate cannot put aside the legislative business of the nation for such a lengthy period of time. Numerous commentators have remarked on the impracticality of a full Senate trial under similar circumstances.

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[27] *Manual,* Section 614. (Emphasis added). Cited, p. 299 of House Doc. 99-279, *Rules of the House of Representatives.*

> It is unreasonable, to say the least, to assume that the House of Representatives could drop its work for weeks to impeach and that the Senate could or should lay aside all legislative business for an average period of seventeen days in order to impeach and try a . . . judge.[28]

Alexander Simpson was trial counsel to Judge Archbald during the latter's impeachment.[29] As such, Simpson's views deserve special attention. Simpson noted:

> With Congress now sitting a large part of the entire year, and with the rapidly growing legislative business of the country, due time cannot be given by the whole Senate to the hearing of the witnesses. In the Archbald Impeachment portions of seven days were taken in preliminary arrangements in the Senate, the trial consumed from December 3rd to December 19th, 1912, inclusive, and from January 3rd to January 8th, 1913, inclusive, and the decision was rendered January 13th, 1913. The Senators could not afford that time and properly attend their other duties, and the result was, as heretofore stated, but few of the Senators really heard the whole case.[30]

Among the solutions proposed by Simpson was that of having a committee take evidence.[31] In 1935 the Senate adopted Impeachment Rule XI providing for an impeachment committee to receive evidence and hear testimony.

In a recent essay, Professor Steven Burbank reviewed the impeachment process. Burbank stated that he harbored "* * * no serious doubts about the constitutionality of the Senate's use of a committee in the Claiborne matter. Those who do should read the existing literature and demonstrate the respects, if any, in which it is wanting." [32]

At the Rules Committee hearing on January 26, 1989, Senator Gore noted that the committee procedure is used in virtually every matter that comes before the Senate. He explained that it permits a subgroup of Senators to delve into an issue in great detail; while the Senate trusts their judgment, it retains the right to explore any detail about which the Senate wishes to inquire further.

This Committee believes that a trial before the full Senate would honor form over substance and provide only an illusion of fairness, while the use of an impeachment committee would assure that the Senators appointed to the committee devote their time and attention to the case for its duration. Furthermore, procedures can be adopted by the impeachment committee to provide all Members the opportunity to observe the demeanor of the witnesses and to review a full transcript of their testimony and a report of all other evidence.

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[28] Nunn, "Judicial Tenure", 54 Chi-Kent L. Rev. 29 at 30 (1977) (footnote omitted).

[29] See 6 C. Cannon, *Cannon's Precedents of the House of Representatives*, § 492 (1935) and Williams, "The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials", 50 N.Y.U. L. Rev. 512 at 541 (1975).

[30] Simpson, "Federal Impeachments", 64 U. Pa. L. Rev. 651 at 821 (1916).

[31] *Id.* 822.

[32] Burbank, "Alternative Career Resolution: An Essay on the Removal of Federal Judges", 63 Ky L.J. 643 at 688 (footnote omitted).

Judge Hastings suggests that credibility of the witnesses is important in this case and argues that fairness requires that the demeanor of witnesses must be observed personally by the Senators in a full Senate trial. The Committee concurs with the observations of the Managers, who note that credibility of witnesses may be determined by means other than by personally observing the demeanor of a witness. They cite as examples the internal consistency of a witness' testimony, the presence or absence of corroboration and the existence of a motive that might affect the credibility of a witness.

The Managers suggest that the impeachment committee's proceedings be videotaped and that those videotapes be made available to all Members. In this way, all Members would have the opportunity to observe the demeanor of any witness about whom demeanor evidence is important. We would add that the televising of the committee's public meetings would also permit Members to observe the impeachment committee's proceedings without requiring their attendance at each hearing of the committee.

There has been no showing that the foregoing methods of evaluating the credibility of witnesses would be insufficient in the instant case. Even Judge Hastings acknowledges:

> Only one of the methods proposed by the Managers for keeping Senators informed could materially reduce the unfairness inherent in the use of a Rule XI committee in the trial of this impeachment. The delivery of opening statments by the parties followed by a replay of a videotape that projected *all* proceedings during which admissible evidence was received by a Rule XI committee, followed by closing arguments before the full Senate, would replicate the required trial process as nearly as possible.[33]

The respondent appears to concede in the above passage that it is not essential to this case that the Senate view the witnesses live. The Committee also notes that when Judge Hastings appeared before the Committee to testify on these procedural questions, he chose to present to a committee of Senators a videotape in which he discussed the merits of the impeachment case.

The Committee sees no useful purpose in requiring the Senators to gather in one place to watch a videotape of the impeachment committee proceedings. The Rule XI procedure allows all Senators to view the proceedings by way of television or videotapes and transcripts independently, as the schedule of each Senator permits, and is the one most likely to result in full and careful consideration by each Senator. In addition, Rule XI procedure includes specific authority for the Senate to request the testimony of any witness, or a retrial of the entire case, before the full Senate, if the Senate believes it needs such testimony. If the Senate chooses not to call a witness to repeat his or her testimony before the full Senate, the Senators might simply be rejecting the additional demeanor evidence that such witness might provide by repeating testimony in person before the whole Senate.

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[33] Memorandum dated September 15, 1988 submitted by Judge Hastings, at 5–6 (emphasis in the original).

Most important, it must be remembered that an impeachment should not be viewed as a criminal prosecution. "The impeachment process was designed to be neither a criminal proceeding, nor in a strictly technical sense, a juridical trial." [34] Hamilton characterized it as a method of "National Inquest" into the conduct of public men.[35]

The proposition that impeachment proceedings are not criminal trials is also evident from previous actions of this Committee. In 1974, the Rules Committee held hearings on the subject of whether the Senate Impeachment Rules would be revised.[36] Among the proposals presented to the Committee was one by Senator Mansfield which set out comprehensive, detailed rules of procedure which were "substantially modeled" on the civil and criminal rules of procedure for federal courts.[37] The Committee did not adopt the Mansfield proposal; instead it made minor changes in the existing rules.[38]

One change made by the Committee is particularly important. Rule VIII was amended to substitute the words "person impeached" for "person accused" or "accused." The report explains that ". . . there was a general feeling among the members of the Committee that the language of the rules should accord with the *sui generis* nature of impeachment and should, therefore, avoid terminology closely allied with criminal proceedings." [39]

There are many distinctions between an impeachment and a criminal prosecution. For example, Senators are both judge and jury, and admissibility of evidence may be determined by vote of the Senate. Members, not the parties, decide if Members are qualified to hear the case, and Senators have an unlimited right to pose written questions to witnesses and counsel. Also, during the Claiborne trial, the Senate rejected a motion that would have imposed on all Members a single standard of proof for conviction.

In the Claiborne case, both the impeachment committee and the full Senate rejected the motion that they were in any sense bound by the outcome of the criminal prosecution against Judge Claiborne.[40] The Constitution provides further evidence that this view is consistent with that of its authors where it specifically permits criminal prosecution of a person impeached. In any event, in view of the foregoing, the acquittal of the respondent is irrelevant to the questions before this Committee.

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[34] Firmage and Mangrum, "Removal of the President: Resignation and the Procedural Law of Impeachment", 1974 Duke L.J. 1023, 1029.

[35] *The Federalist,* No. 65 (A. Hamilton), New American Library Edition, 397 (1961).

[36] See *Executive Session Hearings Before Committee on Rules and Administration and its Subcommittee on Standing Rules of the Senate,* United States Senate, 93rd Cong., 2nd Sess. pursuant to S. Res. 370 (August 5 and 6, 1974). S. Res. 370 directed the Committee to study the Senate rules and precedents applicable to impeachment trials.

[37] *Id.*, 173.

[38] See *Report of the Committee on Rules and Administration, Amending the Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials.* Report No. 93-1125, 93rd Cong. 2nd Sess., 28-41 (1974).

[39] *Id.*, 31.

[40] See *Report of the Senate Impeachment Trial Committee: Hearings Before the Senate Impeachment Trial Committee United States Senate, Ninety-Ninth Congress, Second Session on the Impeachment of Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, of High Crimes and Misdemeanors,* S. Hrg. 99-812, 99th Cong., 2d Sess., Part 1, 109-110 (1986)(September 10, 1986 meeting on pretrial motions) (hereinafter, S. Hrg. 99-812). See also S. Doc. 99-48, *supra.*

The Senate utilizes committees not only in legislative proceedings but also in quasi-executive proceedings, such as confirmations of executive appointments, and in quasi-judicial proceedings.

Quasi-judicial proceedings include such things as judging elections and qualifications of Members and determining whether to discipline or expel Members. Inquiries in these difficult and important cases have been referred to committees from the earliest days of the Congress.[41]

In conclusion, the Committee finds that the use of an impeachment committee will provide respondent with the opportunity for a fair and orderly hearing of his case and that procedures can be adopted to enable all Senators to hear and observe the demeanor of witnesses and review their testimony and other evidence.

Recommendations

The Committee recommends adoption of the original resolution reported herein which provides for the appointment of a twelve member impeachment committee pursuant to Impeachment Rule XI.[42] The Majority Leader and Minority Leader would each recommend six members to serve on the committee, which would select a chairman and vice chairman from its membership.

It is important to the operation of the impeachment committee that it have sufficient authority to accomplish its responsibilities under Rule XI. To that end, the Committee recommends that the impeachment committee be deemed a standing committee of the Senate, with authority to report resolutions to enforce its subpoenas and orders, and to order printing of its documents. It should also have authority to immunize testimony; however a specific grant of such authority is not necessary here, because it appears that the impeachment committee has it under 18 U.S.C. 6005, which confers such authority on any Senate committee.

The Committee notes that Impeachment Rule XIX does not permit members of the Rule XI committee to ask questions directly; instead, they must submit questions in writing. In order to provide a more workable proceeding, this Committee recommends that the chairman of impeachment committee be permitted to waive Rule XIX and permit Members of the impeachment committee to ask questions of witnesses directly.

The submissions of the parties indicate that the evidence in this case is likely to be voluminous. The Committee believes it would be helpful to Members in their review of the record to have available a neutral summary, and that such summary should be prepared by the impeachment committee. The Committee recommends, therefore, that, in addition to the certified copy of the transcript of the proceedings and testimony given before it, the impeachment committee be authorized to report to the Senate a statement of facts that are uncontested and a summary of evidence that the parties have introduced on contested issues of fact. The summary of evidence should make appropriate references to the record.

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[41] See the 1793–1794 election challenge case of Albert Gallatin, reported in R. Hupman, *Senate Election, Expulsion and Censure Cases From 1789 to 1960,* S. Doc. 71, 87th Cong., 2d Sess. 1 (1962).

[42] See Appendix B for text of S. Res. 38, 101st Congress, 1st Session.

IV. ANY OTHER MATTER WHICH MAY ASSIST THE SENATE IN A FAIR TRIAL OF THE PENDING IMPEACHMENT

(A) INTRODUCTION

This Committee was directed to report to the Senate on "any other matter which may assist the Senate in a fair trial of the pending impeachment." In order to identify areas of the process that should be reviewed to assure a fair trial, the Committee invited the parties to submit their suggestions, and also reviewed the record of the Claiborne impeachment trial for observations and recommendations of Members. In their statements to the Committee, the parties have made a number of suggestions concerning the procedures of the Senate. Following the Claiborne impeachment trial in 1986, many Members stated, on the floor of the Senate, their views, objections and recommendations concerning that trial and future trials. The remarks of the Members are collected in S. Doc. 99-48, pp. 301-374.

The Committee believes that the question of providing a fair trial is so important to the process that, as in the case of the appropriate use of Rule XI, it has given the parties and Members the opportunity to be heard. The Committee has had the full benefit of their views and advice before submitting its findings and recommendations to the Senate. The remainder of this section of the report, therefore, sets forth the comments of the parties.

The Committee wishes to emphasize that it has not made a final determination of all fairness issues raised during these impeachment proceedings. Fairness will continue to be reviewed during the course of the trial by the impeachment committee and the Senate.

Impeachment Rule XI states that the Rule XI committee and its chairman ". . . shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials." Impeachment Rule VI gives the Senate power to ". . . make all lawful orders, rules and regulations which it may deem essential or conducive to the ends of justice." Rule VI and Rule XI provide ample authority to allow the Rule XI committee to establish procedures which guarantee a fair trial.

(B) STATEMENT OF HOUSE MANAGERS[43]

I. SUGGESTED PROCEDURES FOR THE SENATE TRIAL

The House of Representatives suggests that the Senate consider establishing a two stage proceeding in order to achieve an efficient and effective disposition of the pending impeachment. The first stage would take place pre-trial, during which all dispositive motions would be briefed, argued and resolved. It is the view of the House that any motion filed by the parties that seeks to dispose of one or more Articles of Impeachment should be decided by the full Senate. Preliminary matters, such as the setting and enforcement of a briefing schedule and conducting a hearing on the motions, could be handled by the full Senate or, in the alternative, delegated to a Committee. If a Committee is used during this stage of the impeachment proceeding, the Senate could ask it to recommend a disposition of the motions.

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[43] See footnote 24.

The second stage of the pending impeachment would focus on the presentation of evidence, including the resolution of any evidentiary motions filed by the parties and the trial itself. As stated in previous submissions to this Committee, the House of Representatives does not take a position on whether the trial should be conducted by the full Senate or a Committee appointed pursuant to Rule XI of the Senate Impeachment Rules.[1] There is ample precedent for either alternative, and the House Managers are ready to proceed before whichever body the Senate chooses to hear the evidence. The House does suggest, however, that the Senate explicitly establish that whichever body hears the evidence has the authority to decide all evidentiary matters.

The House urges that the Senate establish a procedure that precludes the bifurcation of the presentation of evidence. Whichever body the Senate selects to hear the evidence should hear all the evidence. As previously noted by the House Managers, the presentation of some evidence only to the full Senate and other evidence only to a committee runs the significant risk that undue weight will be placed on the evidence presented on the floor of the Senate.[2] In addition, bifurcation poses the risk of evidence being taken out of context and the application of varying evidentiary standards. For these reasons, the House strongly urges the adoption of a procedure so that all the evidence is presented to a single body.

Finally, the House of Representatives proposes two procedures that would narrow the issues in dispute and, therefore, would expedite the presentation of the evidence at trial. First, the House asks the Senate to adopt a rule that would hold that any proposed stipulation of fact filed with the Senate by a party to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation of fact should not be taken as true.

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[1] *See* Reply of the House Managers to the September 8, 1988 Letter from the Senate Committee on Rules and Administration at 1.

[2] *See* Response of the House Managers to the August 10, 1988 Letter from the Senate Committee on Rules and Administration at 8-9.

Second, the House asks the Senate to adopt a parallel rule addressing the authenticity of documents, which would establish that any proposed stipulation regarding the admissibility of a document filed with the Senate by a party to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true.

By adopting the above proposed procedures, the Senate would ensure a timely and just resolution of the pending impeachment proceeding.

(C) STATEMENT OF JUDGE HASTINGS [44]

September 6, 1988

To: THE COMMITTEE ON RULES AND ADMINISTRATION OF THE UNITED STATES SENATE

Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Need for a Clear Statement that the Rules of Evidence Will Be Properly Applied and Proper Discovery Ordered

The Committee requested that we identify other matters which may assist the Senate in conducting a trial that is fair to Judge Hastings and to the House of Representatives. Early clarification on two points would enhance the prospect of a fair trial and facilitate the parties' efforts to prepare for it:

1. In all trials before the full Senate, the rules of evidence have been strictly applied. Their application is likely to be important here, especially to prevent the evidence from becoming infected with inadmissible and pernicious hearsay and improper or ill-founded opinions. Since the last full trial of an impeachment in 1936, however, the common law rules of evidence have significantly evolved and have been largely supplanted by codified rules -- in the federal system, by the Federal Rules of Evidence adopted by the Congress in 1975.[1]

We believe that the parties would be aided in preparing for, and the Senate would be aided in conducting, a trial in this impeachment if the presiding officer and the Senate were to specify whether the common law rules, as construed and applied in the courts and in prior impeachment trials, or the federal rules, as construed and applied in the courts, will constitute the primary authority to which the Senate would look for guidance in a trial of this impeachment. We recognize that such a preliminary ruling would not bind the Senate in the rulings that became necessary at trial, but we believe early specification would facilitate the parties' preparation and reduce the need for extended argument at trial.

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[1] *Codified as amended at* 28 U.S.C. App 676 (1982) and App. 127 (Supp. IV 1986).

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[44] See footnote 19.

2. The House has traditionally permitted an accused official to participate in depositions taken in its inquiries and has supplied him or her with copies of statements and documents obtained. Where this is not done, we believe that the Senate has and must have the authority to correct the deficiency by ordering the House managers to produce depositions and other requested materials.

The House did not follow the customary practice in this inquiry. Apart from access to the record formally transmitted by the Judicial Conference and such additional documents as its special counsel thought appropriate, the House has failed to provide Judge Hastings with available material necessary to enable him to prepare his defense. In particular, the House requested and received numerous investigative files from the Judicial Council for the Eleventh Circuit (the "Council"), long after the certification by the Judicial Conference of the United States. In addition, we believe that the House obtained copies of memoranda and notes from interviews of potential witnesses that were conducted by Justice Department attorneys, FBI agents, and the Council's investigators. Moreover, the special counsel and his staff were authorized to and did take depositions and conduct interviews of potential witnesses in these proceedings. Thus, transcripts and memoranda documenting the statements made by those interviewed should also be available.

The production of this material is necessary to enable Judge Hastings to defend himself properly, and we believe that early production would facilitate necessary preparation and assure a more orderly trial. Accordingly, we suggest that the Committee recommend that the Senate enter an appropriate order directing their early production by the House.

We develop the first of these points below. We have been unable to complete our examination of the precedents and principles supporting the second within the time allotted. It is discussed only briefly below. We will forward a supplemental memorandum on this point shortly, if that seems necessary.

1. The Rules of Evidence

The principle that the rules of evidence applied in the courts must be strictly observed in the trial of impeachments has been long established and consistently followed by the Senate in this county and by the House of Lords in

England.[2] Ordinarily, there would be no need to report the history and reasons that led to the adoption of such a necessary and venerable principle. Some discussion seems appropriate here, however, for two reasons. First, there is ground for concern that the lessons of history may have been forgotten over the past fifty years. The proceedings in the House, for example, were conducted largely as if the House were acting upon a clean slate: The precedent and practices established in prior inquires were largely overlooked and ignored.[3] Second, there is ground for concern that some may view the rules of evidence and procedure as unnecessary shackles for an expeditious trial of an impeachment in the Senate and may have forgotten that many of the rules now followed by the courts can be traced to abuses and injustices that took place in the trial of impeachments in the House of Lords, long before our Constitution was adopted. Those who share this view may have also forgotten that arguments that the proceedings should not be encumbered by those strict rules have been regularly made and decisively rejected by the Senate in impeachment trials throughout the Nation's history. Those reasons suggest that the history and reasons that compel the application of those rules should be briefly recalled.

a. *Illustrations from history:* The issue was decisively resolved by the House of Lords in England early in the trial of the impeachment of Warren Hastings in 1788, and thereafter applied throughout the trial.[4] As with the trial of this Hastings, the trial of that Hastings came after an extended period in which the impeachment process had not been used -- there a period of forty years.[5] The managers for the House of Commons in that case strenuously argued that proceeding showed be governed by '". . . the natural reason of men, the principles of honor, the spirit of cavaliers . . . ; not the low principles of jurisprudence only.'"[6] Those in the House of Lords who took the point argued that "the law of parliament was not to be shackled by the rules of the courts below . . . ."[7] The House of Lords, however, rejected those arguments throughout the extended proceedings. In the words of the Lord Chancellor, "'. . . If we talk about the law and usage of parliament, and are bound by it, what injustices shall we not commit?'"[8]

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[2] The English practice was noted in Jeffersons Manual, ch. III, reproduced in Constitution, Jefferson's Manual, and Rules of the House of Representatives, H. Doc. 403, 95th Cong., 2nd Sess. [hereinafter "Jefferson's Manual"], § 619 at 286. The principle is stated as established, and the precedents applying the rules of evidence in the trial of impeachment are reported, in "Rules of Evidence in Impeachment Trials," 3 Hinds' Precedents, ch. LXIX, § 2218 et seq., 537-643 (1907) (trials form 1797 to 1903), and in "Rules of Evidence in an Impeachment Trial, 6 Cannon's Precedents, ch. CXCIX, § § 493 et seq., 679-83 (1936) (to the same effect; extending report of precedents in trials through 1933). These sources are excerpted in House Comm. on the Judiciary, Impeachment: Selected Materials on Procedure, 93rd Cong. 2nd Sess. (Comm. Print 1974) [hereinafter "Impeachment Procedure"].

[3] Indeed, the only place in the entire record of that inquiry where the precedents and practices were identified or discussed was in the memoranda submitted on behalf of Judge Hastings. See Hearings, App. III at 14-30, 44-46, 248-250, 294, 343, 432-36, 458-61 (discussions and citations); compare Hearings (the rest of the record) (absence of discussion or citation to precedent).

The issues and similar arguments were forcefully presented to the Senate in the impeachment trial of United States District Judge James Peck in 1830. In that case, the roles were reversed. It was counsel for respondent who argued that the Senate should reject its prior practice and the practice adopted by the House of Lords in the trial of Warren Hastings and should not adhere to:

> the application of the rigid rules of evidence which governed the practice of courts of law . . .. [He argued that proceedings on impeachment] are not to be trammeled and hemmed in by rigid rules of evidence.[9]

It was the chairman of the managers for the House who urged the principle that had been, was, and should be adhered to be the Senate:

> . . . But the gentlemen seems to have forgotten that in that far-famed trial the very question was fairly made and decided; and it was held that the House

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[4] The most readily accessible source giving the history of the proceedings is P. Marshall, The Impeachment of Warren Hastings (Oxford 1965) [hereinafter "Marshall"]. Professor Marshall provides citations to the original sources. See Marshall at 64-75.

[5] Id. at 64.

[6] Id. at 65.

[7] Id. at 44.

[8] Id.

[9] See 3 Hind's Precedents § 2218, at 538 (quoting Mr. Wirt's argument).

> of Lords, when sitting as a high court of impeachment, was bound by the same rules of evidence which regulated the proceedings of the most inferior courts of the kingdom. The whole trial of Judge Chase proceeded upon the same principle.
>
> But even without precedent, could there by any doubt on this question? What sir? Against whom is it that this tremendous power of impeachment is invoked? Is it not against high state criminals? Men of standing and influence and character? . . . [Shall these] accused . . . enjoy rights and privileges and immunities which are denied to any ordinary citizen, when arraigned before the most inferior court of the land? We deny the existence of any power, even in this high court, to dispense with the rules of evidence. When the House of Representative become accusers, it is their right to have these rules administered here as they are administered by the Supreme Court and other tribunals in the country.[10]

The reasons why the rule had been adopted and persisted were eloquent by argued by one of the other managers in that case:

> I confess I feel alarmed to hear it gravely urged here that an impeachment is to be governed by other rules than the well-known and long-established rules of evidence. Rules of evidence are as much a part of the law of the land as any other part of it, and they constitute the security of every man. A more dangerous principle could not be broached, or a more alarming principle established than that, in the trial of an impeachment, the ordinary rules of evidence are to be relaxed; . . . . If this is to be done in favor of the respondent, will it be done in favor of him alone, or may not State favorites be shielded or State victims be destroyed by the same process?[11]

The Senate decisively reaffirmed the principle that the rules of evidence must be strictly applied in response to these arguments.[12]

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[10] Id. at 539 (quoting Manager Buchanan).

[11] Id. (uoting Manager Stonn).

[12] Id.

The Senate has consistently applied the rules of evidence in impeachment trials, and it should continue the established practice here. The illustrations chosen merely identify the grounds for that commitment and make it clear that claims seeking departures from those rules typically reflect no more than the claimant's inability to marshall and present proper evidence. The Senate has consistently rejected such pleas, and it should reaffirm its commitment here. Indeed, the necessity for strict compliance here is far greater: If Judge Hastings is to be the first official to be reprosecuted by the House and retried by the Senate after having been prosecuted by the executive and acquitted in the courts upon the unanimous verdict of a jury, the new prosecutors can hardly claim that the rules of evidence should be *relaxed* to enhance the prosecution's chances the second time around.

b. *The rules to be applied*: There appear to be two views that the Senate might consider in providing guidance to the parties. First, the Senate might express the sense that the presiding officer and the Senate should look to the Federal Rules of Evidence, as generally construed and applied in the courts, in the conduct of the trial of this impeachment. Although time has not permitted a complete examination of the precedents, this would appear to conform to one view of the practice in prior impeachment trials. At those trials the common law rules applied were those recognized at the time the trial took place. It would also facilitate the work of the parties and the Senate by designating a comprehensive and readily accessible body of materials as the preferred source of guidance.

Second, the Senate might, in the alternative, express the sense that the common-law rules should remain the primary source, with primary reference to their application in prior impeachment trials and secondary reliance up on their application in the courts on points for which there was inadequate precedent in the Senate. This also would also be consistent with established practice. It would, however, require the parties and the Senate to rely upon sources that are less accessible and less well-known. As precedent, it might also limit the ability of the Senate to adapt the rules of evidence in impeachment trials to the contemporary practices developed by the courts in their on-going quest:

> to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of

the growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined.[13]

Whatever the choice, we submit that the preparation and trial of the present impeachment would be facilitated by an early specification by the Senate of the sources to which it will, and that counsel should refer in applying the rules of evidence at trial. We have raised this concern in the memorandum for that reason.

2. The Necessary and Proper Discovery

Time has not permitted us to examine the precedents fully or to develop the applicable principles properly. Nonetheless, a few general propositions may be safely stated. The House has initiated accusatory proceedings in the Senate that require a trial. In so doing, the House has come before the bar of the Senate as a party-litigant, thereby voluntarily submitting to the jurisdiction of the Senate. Subject only to the limitations imposed by the Constitution, thare can be no doubt that the Senate has the power to control the proceedings and to make such orders as may be necessary to assure fairness to the accused as well as his accusers. Those principles along seem sufficient to establish that the Senate has the authority to enter appropriate orders compelling proper discovery.

The source to which the Senate should look for the general principles that should govern discovery in the present case also seem clear. Over the fifty years that have elapsed since the last major trial of an impeachment, the principles governing of pleading and discovery have evolved significantly in the courts. The Senate should look to contemporary notions of due process and fundamental fairness to determine what disclosure should be required here.

The need for discovery here is also apparent. For seven years, accusers from all three branches, all armed with compulsory process, have been investigating Judge Hastings. Judge Hastings has been denied the power and the resources necessary to conduct effective investigations of his own. Given the inordinate passage of time, it is clear that records have been destroyed and memories have dimmed. The evidence that remains is likely to be that gathered and preserved by his accusers.

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[13] Rule 102, Federal Rules of Evidence.

Simple fairness requires that the accusers not be left in exclusive control of the only sources from which evidence relevant to the trial of an impeachment may be gathered. The nature and constitutional dignity of the proceedings are such that the evidence received gathered by the House should be made readily accessible to the accused. We submit that the Committee should recommend that the Senate enter such orders as are necessary to assure that Judge Hastings and his counsel are granted that access.

Conclusion

The concerns addressed in this memorandum are concerns which our prior dealings with representatives of the House have led us to conclude were likely to become significant. The memoranda being submitted by the House may alleviate these concerns and may, and likely will, suggest others. Based upon these memoranda and the respective replies, the Committee may itself identify further concerns that should be addressed or concerns that could be narrowed. If so, we would appreciate the opportunity to appear before the Committee so that the judge's news may be fully known and so that we may clarify any points that may be questioned by members of the Committee.

(D) HOUSE MANAGERS' RESPONSE TO JUDGE HASTINGS' STATEMENT [45]

II. Pretrial Discovery Is Unnecessary and Unprecedented

The House Managers oppose pretrial discovery by either party to this impeachment proceeding. It is unnecessary because Judge Hastings has already been provided with thousands of pages of evidentiary material. Moreover, the House Managers have found no precedent for pretrial discovery in American or English impeachment proceedings, nor is there any reason to provide such an innovative procedure in this case. Finally, Judge Hastings' argument that he is entitled to pretrial discovery because the House of Representatives allegedly failed to adhere to its previous practices is without merit.[25]

In his Memorandum on Discovery, Judge Hastings asserts that "the House has failed to provide [him] with available material necessary to enable him to prepare his defense."[26] Yet, during the House of Representatives' investigation into Judge Hastings' conduct, and prior to the seven days of hearings conducted by the Subcommittee on Criminal Justice, the House provided Judge Hastings with a copy of its 14 volume Statement of Information.[27] That statement, written in paragraph form, sets forth a detailed chronology of the events in the bribery conspiracy and, even more importantly, contains virtually all the documentary evidence which was relied upon by the House of Representatives when it overwhelmingly voted to impeach Judge Hastings on Articles I through XV.[28] In addition to the 14 volume Statement of

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[25] Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Need for a Clear Statement that the Rules of Evidence Will Be Properly Applied and Proper Discovery Ordered, dated September 6, 1988 [hereinafter "Memorandum on Discovery"] at 2.

[26] Ibid.

[27] The Statement of Information is reprinted as Appendix II to In the Matter of the Impeachment Inquiry Concerning U.S. District Judge Alcee L. Hastings: Hearings before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. (1988).

[28] One exception is a document prepared by staff based upon an interview of Dudley Williams. A copy of the interview report was provided to Judge Hastings prior to the vote by the Subcommittee on Criminal Justice on the 17 Articles of Impeachment. To the extent any additional materials were introduced into the record at the Subcommittee

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[45] See footnotes 18 and 20.

Information, the House provided Judge Hastings with a copy of all court documents and grand jury material supporting Article XVI, which charges the judge with disclosing confidential information obtained from a Title III wiretap.

In his request for pretrial discovery, Judge Hastings also fails to mention that in advance of the House hearings he and his counsel had access to the evidence amassed by the investigating committees of the Eleventh Circuit. The House provided him with copies of the 2800 exhibits gathered by the Eleventh Circuit committee appointed to investigate the bribery conspiracy allegation, and a copy of the transcript of the testimony of the 100 witnesses heard by that committee. Judge Hastings also obtained a complete copy of the record of the Eleventh Circuit committee appointed to investigate the wiretap disclosure, which includes a transcript of all the testimony heard by that committee and the documentary evidence it obtained.

Finally, Judge Hastings has been provided with a transcript of and related exhibits pertaining to his criminal trial and the separate trial of William Borders. He also has had access to the trial transcript of *United States v. Romano*, the case which was the subject of Judge Hastings' and William Borders' bribery scheme.

Judge Hastings requests access to the House of Representatives' investigative files, to which he has no right. History establishes that the respondent in a House of Representatives impeachment inquiry has no right of access to such materials.[29]

In response to Judge Hastings' request for pretrial discovery, the House Managers also have researched both American and English precedent. That research discloses that discovery, or anything resembling such a practice, has never been a part of impeachment proceedings in the Senate or House of Lords. There was no pretrial discovery in the Senate proceedings involving former Judge Harry Claiborne, which was also a case arising under the Judicial Councils Reform and

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hearings, Judge Hastings was provided a copy.

[29] *Conduct of Harry B. Anderson, United States District Judge, Western District of Florida: Hearing on H. Res. 191 and 305, Committee on the Judiciary, Special Committee*, 71st Cong., 2d and 3rd Sess. (1930) 100-101.

Judicial Conduct and Disability Act of 1980.[30] Nor is there any evidence of pretrial discovery in earlier Senate impeachment proceedings.

With respect to English precedent, the House of Lords did not provide the respondent in an impeachment proceeding with even the bare minimum of information, let alone the wealth of information already provided to Judge Hastings in the present case. In the proceedings on the impeachment of Sir John Bennet in 1621, the House of Lords' procedures provided that the respondent would not even receive, prior to trial, the names of the witnesses to be called against him. Foster, *The House of Lords, 1603-1649* (1983) 156-157. Similarly, in the proceedings on the impeachment of the Earl of Middlesex in 1624, the House of Lords refused to give the respondent a copy of the evidence presented by the House of Commons to the House of Lords' committee until after he answered the impeachment charge. *Id*. at 158.

This lack of precedent for pretrial discovery in an impeachment proceeding makes sense in light of the structure of our Government. The House of Representatives and Senate, like the House of Commons and the House of Lords, are coordinate parts of the Legislative Branch. The House of Representatives does not have the authority to order the Senate to act in a particular manner. Likewise, the Senate does not have the authority to compel the House of Representatives to take certain action, including the disclosure of investigative files to a respondent in an impeachment proceeding. The fact that the House of Representatives presents the Articles of Impeachment to the Senate for trial, as required by the Constitution, does not in any way limit its independent authority as one of the two houses of Congress.

Finally, Judge Hastings invents history in arguing that he should be entitled to pretrial discovery because the House of Representatives has failed to follow its established practice of allowing an "accused official" to fully participate in its investigations. Judge Hastings asserts:

> The House has traditionally permitted an accused official to participate in depositions taken in its inquiries and has supplied him or her with copies

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[30] Former Judge Claiborne did make a Motion for Discovery during the Senate proceedings. In that motion, however, he requested materials which were not in the possession of the House of Representatives. The motion was not granted. *Report of the Senate Impeachment Trial Committee*, 99th Cong., 2d Sess. Part 1 at 115.

> of statements and documents obtained. Where this is not done, we believe that the Senate has and must have the authority to correct the deficiency by ordering the House managers to produce depositions and other requested documents.[31]

Judge Hastings fails to cite any authority for his statement of House practice. There is none. The House of Representatives does not allow an "accused official" in an impeachment investigation, or any other type of investigation, to participate in its inquiry. Even in the impeachment investigation of President Richard Nixon, the House did not allow the President's counsel to participate in its investigation.[32] Similarly, when the House Committee on Standards of Official Conduct conducts an investigation into a House Member or employee, counsel for the "accused official" does not participate in the taking of depositions or in any other type of fact gathering. Only when the Committee votes to hold a disciplinary hearing, does it provide the respondent with a copy of the evidence it intends to rely on at the hearing and any exculpatory information.[33]

Judge Hastings' argument that he is entitled to discovery based on a "deficiency" of House of Representatives' practice deserves no consideration. The House has conducted its impeachment investigation consistent with past practice and has done so in order to effect full and fair disclosure of relevant information.

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[31] See note 25 supra.

[32] J. Labowitz, Presidential Impeachment (1978) 190 n.30.

[33] Rules of Procedure, House of Representatives Committee on Standards of Official Conduct (1987), Rules 18 and 19.

(E) FURTHER STATEMENTS OF JUDGE HASTINGS [46]

1. Statement dated September 19, 1988

To: THE COMMITTEE ON RULES AND ADMINISTRATION OF THE UNITED STATES SENATE

Further Memorandum on Behalf of United States District Judge Alcee L. Hastings: The Need for Funds to Support His Defense and Two Necessary Comments on the Managers' Reply

The Rules Committee should recommend that the Senate authorizes expenditures from the contingent fund to pay for the expense of Judge Hastings's defense. The managers' reply[1] reinforces the need for the Senate to defer further proceedings in this case until the 101st Congress has convened and the new House has notified the Senate that it has appointed (or reappointed) qualified representatives to act as managers on its behalf, and the Rules Committee should so recommend. We develop both points briefly below.

1. *An Essential Requirement of Fairness: Funds for a Defense.* For seven years, Judge Hastings has been embroiled in legal proceedings made necessary by the actions taken by officials in the executive branch, the judicial branch, and the House of Representatives. For seven years, the expenses incurred by Judge Hastings's accusers have been paid from public funds. For seven years, Judge Hastings has been required to defend his conduct and office without any support from public funds. The proceedings initiated by the House make it necessary that he now defend himself one more time in extended proceedings in a forum far from the district in which he serves and resides. If fairness is truly a concern, the Senate should act to ensure that his ability to defend himself before the Senate is not further handicapped by a lack of funds. That conclusion is fully supported by considerations of constitutional principle and sound policy.

Secure tenure and secure compensation were the primary guarantees the Constitution made to assure that federal judges would have the independence necessary to exercise the judicial power properly. Federal judges were guar-

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[1] Reply of the House Managers to the September 8, 1988 Letter from the Senate Committee on Rules and Administration [hereinafter "Managers Reply"].

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[46] See footnote 19.

anteed ". . . a Compensation, which shall not be diminished during their Continuance in Office."[2] Judge Hastings's compensation in office has been diminished for seven years. It may be that a federal judge may be called upon *once* to defend himself at his own expense against accusations that he has committed high crimes and misdemeanors in office, a point on which we take no position at this stage. But surely there must be a limit, and that limit has been long breached in the proceedings against Judge Hastings.[3]

The unique circumstances in which this case comes before the Senate establish the need for financial support here, without requiring the Senate to address the question whether such support should be granted in all impeachment proceedings. Judge Hastings has had to endure the burdens and expenses incident to an eighteen-month investigation and three-week trial through which the executive presented the accusations now re-made by the House. He was acquitted. Judge Hastings has had to endure the additional burdens of four years of administrative proceedings within the judiciary, and related litigation before the courts, while the accusations were reinvestigated. Judge Hastings has had to bear the burdens of the year-long inquiry into those accusations conducted by the House committee, and related litigation before the federal courts, as well as those incident to the hearings before the House subcommittee. Seven years is too much: No federal judge has had to bear the kinds of burdens that have been imposed upon Judge Hastings.

The nature of the proceedings required by the accusations made and the positions taken by the House enhance the need for the Senate to provide funds for the respondent's defense here. The House has exhibited seventeen articles. The managers estimate that the presentation of their evidence at trial will take ten to twelve days. Judge Hastings has estimated that the evidence for the defense can be presented in forty to fifty hours of trial time. The managers acknowledge that some considerable pretrial proceedings will be necessary,[4] albeit while taking inconsistent positions concerning their nature and scope.[5] If the managers' views are correct, Judge Hastings and his counsel should already be devoting full time to preparing for what will be four to six weeks of continuous pretrial and trial proceedings before the Senate. On that point they are correct: They should be, but cannot.[6]

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[2] U.S. Const., art II, § 1. Indeed, Congress has recognized that some provision should be made even for executive officers who must defend their conduct in investigative proceedings, notwithstanding the political resources available to them as officers of the executive branch and the absence of any constitutional guarantee. 28 U.S.C. § 593(g) (1982).

[3] By any fair measure, Judge Hastings has been denied his compensation. In addition to the substantial out-of-pocket costs he has paid, the amount of Judge Hastings's nominal liability for the services of his counsel would be such that his salary as a judge would be inadequate to pay the accruing interest.

The Rules Committee should recommend that the Senate authorize the funds necessary to enable Judge Hastings to defend himself fairly without further depriving him of the compensation that the Constitution guarantees and without forcing his counsel to continue to work under the handicaps that they have been forced to bear over the past seven years. Using the amounts the five-judge committee paid its retained counsel as the benchmark for reasonableness, we estimate that an authorization of $250,000 would be sufficient.[7]

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[4] See Response of the House Managers to the August 10, 1988 Letter from the Senate Committee on Rules and Administration (Sept. 6, 1988) [hereinafter "Managers Statement"] at 5; Managers Reply at 12-13.

[5] Compare Managers Statement at 13 (managers' intent to submit requests for admissions as vehicle for compelling respondent to make discovery concessions) with Managers Reply at 9-12 (no discovery for respondent permissible).

[6] The out-of-pocket costs of the necessary activity will be substantial -- just the amounts needed for travel, living and office accommodations for the judge and out-of-town counsel; long distance telecommunications and transmission of documents; and the like. Moreover, Judge Hastings is represented by two law professors, a sole practitioner in Miami, and a three-lawyer litigation firm in Washington. Each of his counsel must depend, in the absence of funding for Judge Hastings's defense, upon their normal sources of professional employment for the income necessary to support themselves and their families. The House's view makes it clear that the two professors should both take leaves of absence for the coming semester; the sole practitioner should be devoting substantial time now and be prepared to spend four to six weeks in Washington next year; and the Washington firm should be adjusting their support staff and allocating their time as they would in preparing for any major trial of the scope and duration of the one that is forthcoming. The House's stated desire for expedition simply increases the need for the immediate provision of an adequate defense fund.

[7] In perspective, the estimate is modest. At the hearings before the House subcommittee, the lawyer retained by the five-judge committee testified that he had been compensated for his services at the rate of ninety dollars ($90) per hour and

2. *The Manager's Reply and Its Implications.* Established principles of constitutional avoidance and the complexity of the issues presented combine with the requirements of fairness to Judge Hastings to suggest that the Rules Committee should recommend that the Senate address only two issues in the closing days of the present Congress -- its authority to continue the case to the next Congress and the need to provide funds for Judge Hastings's defense.[8] Those are the only two issues identified thus far for which there is any significant need for early resolution. Moreover, the managers' claim that they would have continuing authority to act in these proceedings, after the House that appointed them had adjourned and dissolved, raises constitutional questions that should not be confronted, absent compelling necessity. Finally, the managers' reply demonstrates that there are issues of such complexity that even they have been unable to develop a consistent position. Surely, the Senate should not be called upon to act as a court to resolve complex issues of first impression on a record on which the parties' views have not been fully developed and some of the views expressed are internally inconsistent.

The Senate has retained control of the proceedings in impeachments brought before it by the House and has permitted the cases to develop in an orderly manner that balanced the needs of the public against the requirements of fairness to the accused. For example, as the managers note, in the *Pickering* impeachment the interval between the initial notice from the House to the Senate and the conclusion of the trial in the Senate was more than a year.[9] Judge Hastings does not suggest that the present proceedings will or should take that long. He does submit, however, that the

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that he had received more than $560,000 in fees and some $200,000 for expenses. Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, Pursuant to H. Res. 128, Impeaching Alcee L. Hastings, Judge of the United States District Court for the Southern District of Florida, of High Crimes and Misdemeanors, Ser. 11, 100th Cong., 2d Sess. at 285.

[8] The need to defer the remaining issues would be even greater if the Rules Committee determined that it could not recommend funding for the defense at this time. The Senate should not authorize extraordinary proceedings following an adjournment without considering the additional costs those proceedings must impose upon the accused.

[9] Managers Statement at 2; Extracts from the Journal of the United States Senate in all Cases of Impeachment: 1799-1904, S. Doc. 876, 62d Cong., 2d Sess., at 17-34.

Senate should allow such time as is reasonably necessary to permit an orderly development of the case so that the issues that must be resolved are presented on a proper record with adequate time for deliberation.

The precedents make it clear that the Senate has authority to defer the matter to the 101st Congress. Cases such as *Pickering* make it clear that the Senate has previously allowed cases to develop over a period far greater than will be necessary here. Thus, there is no need for immediate resolution of questions concerning the procedures to be followed in the pretrial and trial proceedings that will be necessary to bring this case to a conclusion.

Moreover, there is a significant constitutional question that can readily be avoided by a simple deferral. In the absence of compelling necessity, the Senate should not seek to compel pretrial proceedings between the adjournment of the 100th Congress and the convening of the 101st Congress. The fact that the terms of all members of the House, including those of its managers, will expire upon adjournment would seem to establish a clear constitutional bar to interim proceedings.[10] That is an issue, however, that would only be presented, if the Senate determined that interim action were necessary. Here it is not, and established principles of constitutional interpretation suggest that the issue should be avoided.

Considerations of fairness to the accused point to the same conclusion. The House has had more than a year to examine the evidence and prepare its case for trial. It has had the assistance of paid special counsel and three paid assistant special counsel, along with such additional support from regular and special staff as seemed appropriate. These are advantages that Judge Hastings has not enjoyed. The

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[10] The bar has true practical consequences. It is the House, not its managers, that has the ultimate authority to make basic decisions concerning its articles of impeachment. For example, the managers have on occasion moved to strike portions of the articles adopted by the House. See Proceedings of the United States Senate in the Trial of the Impeachment of Halsted Ritter, S. Doc. 200, 74th Cong., 2d Session, at 50-52 (motion of managers to strike two specifications). Although the motion was made by the managers there, it was clearly a decision on a substantive matter committed to the House, not merely to those chosen to manage the presentation of the evidence. The requirement that Congress be in session during impeachment proceedings before the Senate is necessary to assure that the House can exercise its prerogatives properly and fully.

House managers' persistent and unprecedented request for interim proceedings can only serve to impose additional and unfair pressures and burdens upon Judge Hastings.

The House chose the time at which it would adopt and exhibit its articles. The Senate should now enforce the consequences of that choice. There *will* be an adjournment, and that adjournment *should* afford Judge Hastings additional time to organize and prepare for trial. The Senate should not accede to the managers' request that the Senate take unprecedented action to deprive Judge Hastings of the time that should be his.

It is also clear that the record is insufficient to permit the formulation of a proper recommendation by the Rules Committee on two major procedural issues that have been raised by the parties' submissions -- the questions concerning the nature and extent of the discovery that must be permitted and whether any use of a Rule XI Committee is or should be permitted at the trial stage of this case.

The managers' reply makes it clear that the Senate cannot fairly address the question whether or what discovery should be ordered on the present record. In the first instance, the views expressed by the managers are inconsistent. At the outset, they appeared to suggest that they would seek discovery and admissions from Judge Hastings as if this were a case being conducted under the Federal Rules of Civil Procedure. On September 8, 1988, requests for admissions were viewed as an available mechanism for establishing facts not in dispute and the authenticity of documents.[11] By September 14, however, after the point had been made that Judge Hastings was entitled to discovery, the prerogatives of the House and precedents from 17th Century criminal impeachments in England became important sources of guidance that precluded discovery.[12] The Rules Committee should not be forced to make hasty recommendations on such a record, and the Senate should not be required to resolve issues on which the managers' position remains uncertain.

In the second instance, the House managers make serious accusations in their reply, accusations which should preclude action by the Senate until Judge Hastings and his counsel have been afforded a fair opportunity to respond. According to the House:

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[11] Managers Statement at 13.

[12] Managers Reply at 9-12.

> Judge Hastings' attack on House procedures . . . rests upon a statement of facts that is *patently untrue*. . . . [R]espondent has *grossly mispresented* the record [concerning the procedural history of this case]. His *distortions* with respect to the procedures used in previous impeachments are equally *disingenuous.*[13]

The charges are false, and the language in which they are made is offensive.[14] The traditions of the Senate preclude any resolution of the underlying discovery issue until Judge Hastings and his counsel have had a fair opportunity to respond and to lay before the Senate the basis in the record and in the precedents of the House for the statements the managers have seen fit to characterize as "patently untrue," "gross mispresent[ations]," and "disingenuous."

After the parties have had a proper opportunity to develop their respective positions on the need for discovery with proper research, it will be for the Senate to decide how the statements and submissions should be characterized. Counsel for Judge Hastings have confidence in the ability of the Senators to assess the accuracy and fairness of the respective submissions, after full briefing, and to determine then which of the parties, if either, has been less than candid and forthcoming in their respective submissions and to assess the consequences that should attach to any established lapses. Counsel for Judge Hastings submit here, however, that the Senate cannot properly act upon this issue until Judge Hastings and his counsel have been afforded an opportunity to respond to charges that attack his integrity and that of his counsel.

The parties appear to be in an agreement that the use of a Senate committee may be appropriate for certain pretrial proceedings. They are in fundamental disagreement over the constitutionality, propriety, and the extent to which the Senate could properly employ a trial committee to receive evidence in this case. The Senate can better assess the scope and need for a pretrial committee after the pleadings are closed and the parties' pretrial motions and memoranda are before it. The need to assess the propriety and use of a trial committee should not be resolved until the pretrial proceedings have been concluded and the pretrial committee, if any, has submitted its recommendations on the subject. The Rules Committee should not recommend that the Senate take unnecessary or premature action in this case. The questions and the case should be deferred to the 101st Congress.

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[13] Managers Reply at 2; emphasis supplied.

[14] The language is such that, had the charge been stated on the floor of the Senate, it would have drawn prompt admonition. See, e.g., Procedures and Guidelines for Impeachment Trials in the United States Senate (Revised Edition), S. Doc. 33, 99th Cong., 2d Sess., at 44-45 (The extract from trial of Judge Swayne in which presiding officer admonished counsel for respondent for use of word "pettifogging" in characterizing effort by House managers).

2. Statement dated January 17, 1989

TO: THE COMMITTEE ON RULES AND ADMINISTRATION OF THE UNITED STATES SENATE

Statement on Behalf of United States District Judge Alcee L. Hastings Concerning Procedures Necessary for a Fair Trial in the Senate in the Present Case of Impeachment

Introduction and Summary

The Committee on Rules and Administration has asked for additional statements on the procedures that the Senate should establish to assure a fair and orderly trial of the present case of impeachment. We have previously submitted five memoranda on behalf of Judge Hastings, four of which address concerns that have not been addressed or resolved.[1] We adopt those memoranda, subject to the additional points developed here, and ask that the Committee consider them now.[2]

We supplement those memoranda here based upon developments that have occurred since the Committee issued its last report[3] and in order to provide additional information that is material to the issues before the Committee and responsive to the request received from the chairman and the ranking member. We begin by describing the steps that must be completed and the conditions satisfied during pretrial proceedings, before a trial can begin. We conclude with a further amplification of our views on the constitutional requirement that the trial be conducted before the full Senate; a more concrete description of the evidence that may be offered; and further amplification of the reason why the rules of evidence must be strictly construed and applied, if the Senate is to keep the trial within manageable proportions.

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[1] "Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Use of a Rule XI Senate Trial Committee to Receive Evidence in this Case," (submitted September 6, 1988) ("Rule XI Memorandum"); "Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Need for a Clear Statement that the Rules of Evidence Will Be Properly Applied and Proper Discovery Ordered" (submitted September 6, 1988) ("Evidence and Discovery Memorandum"); "Comments on Behalf of United States District Judge Alcee L. Hastings on the Views Expressed by the House Managers in Their Memorandum Submitted on September 6, 1988" (submitted September 15, 1988) ("Comments in Reply Memorandum"), and "Further Memorandum on Behalf of United States District Judge Alcee L. Hastings: The Need for Funds to Support His Defense and Two Necessary Comments on the Manager's Reply" (submitted September 19, 1988) ("Compensation Memorandum").

[2] The Compensation Memorandum was submitted on September 19, 1988, and we understand that it was not considered by the Committee last year.

[3] S. Rep. No. 542, 100th Cong., 2d Sess.

There is a further development that should be repeated here. We do not yet have the data necessary to determine what effect it may have upon the timing of the trial, but the judge has concluded, and we have concurred, that the available facts should be fully disclosed. Judge Hastings has undergone tests that have revealed that he has two arteries that are significantly impaired -- one has a seventy-five percent (75%) blockage; the other, fifty percent (50%). Those tests also revealed that the judge has an inflamed ulcer in his duodenum. The presence of the ulcer apparently compounds the medical problems in developing and initiating procedures to address the arterial blockages.

The judge has undergone further tests, and the results are being evaluated. Until the tests and evaluations have been completed and the judge has received and considered the necessary medical opinions, we do not know whether his condition will have any effect upon the timing of the trial or what that effect might be. If action appears necessary at that time, we shall promptly submit a request, with appropriate documentation, to Senate. We report these developments here solely to assure that the Committee is advised and aware of information that may later prove material to the issues before it.

Pretrial Proceedings

Six conditions must be satisfied *before* the Senate can conduct a trial that is fair to Judge Hastings or the Senate:

1. Three pretrial motions must be decided in order to determine whether and on what articles a trial will be necessary. We believe that a trial on the first fifteen articles is barred by the 1983 jury verdict acquitting the judge and by the lapse of more than five years thereafter without action by the House. We expect to complete and file the motions and the supporting memorandum necessary to present these issues to the Senate prior to the Committee's scheduled hearing.

We shall also submit motions asking the Senate to dismiss Article XVI and XVII. Judge Hastings believes that allegations of improper disclosure, such as those made in Article XVI, could be framed to state a "high crime" within the meaning of the constitutional standard, notwithstanding the Justice Department's view that it was probable that Judge Hastings's alleged disclosure did not constitute a crime under existing statutes. We believe that Article XVI, however, does not allege the elements necessary to establish such an offense and that it contains extraneous matter. We believe that the Senate must define the elements of this new "high crime" and then afford the House an opportunity to determine whether the evidence available to it warrants a trial upon proper allegations. Article XVII is a cumulative count. The Senate must determine whether that article alleges a separate offense that the House may properly prosecute in this impeachment.[4] We anticipate that the motions to dismiss these articles will be completed and filed before or within the week following the Committee's hearings.

2. Judge Hastings must be given copies of and access to documents and other materials that the House has thus far withheld and must be afforded a fair opportunity to review that material in preparation for trial. The House obtained some 210 witness files, eight file drawers of documents, more than fifteen notebooks, and other documents directly from the Judicial Council of the Eleventh Circuit. These documents and materials were *not* part of the record transmitted to the House pursuant to the certificate issued by the Judicial Conference of the United States, a record that included some 4880 pages of transcript and 2800 exhibits. The House has had these additional materials for well over a year. The Council did not supply copies to Judge Hastings, and the House has afforded him neither access nor copies.

One hundred and seventy five (175) witnesses have testified at some stage of the proceedings, and more than 100 other persons, who have never testified but who are likely to have relevant knowledge, have been identified. The House has acknowledged that its staff took *ex parte* depositions from or interviewed more than sixty persons before the inquiry ended, and the managers have continued to use the House's subpoena power to obtain additional testimony and statements in preparation for trial. (See below.) Judge Hastings has received transcripts of the formal testimony of the 175. He has not had access to or copies of the additional statements and depositions gathered from these and other witnesses.

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[4] Article XVII "collects" allegations made in the first sixteen articles. The dismissal of any of those articles would, in any event, require that Article XVII be dismissed without prejudice to the right of the House to resubmit an appropriate article for consideration.

This is not fair. We have developed points that bear upon the judge's right to obtain these materials in our prior memoranda.[5] We have since submitted to the House Managers a comprehensive First Request for Production of Documents and Other Tangible Material.[6] After we have received and had discussions concerning their response, we shall promptly submit to the Senate such motions to compel as may be necessary.

3. The need for such discovery has been enhanced by the extraordinary actions that the managers appointed by the House in the 100th Congress have taken subsequent to exhibiting the Articles of Impeachment and to the adjournment of that Congress. The managers have continued to use the House's subpoena power to conduct *ex parte* inquiries and to compel testimony without notice to Judge Hastings or his counsel. The use of the Houses's subpoena power subsequent to the adoption and exhibition of articles of impeachment to continue an *ex parte* inquiry solely for the purpose of gathering additional evidence is grossly improper. All prosecutors must now be aware that the continued use of a grand jury's powers to gather evidence after an indictment is returned as improper and sanctionable. The managers compounded the outrage by initiating and conducting the inquiries at a time when they knew that their actions would not be effectively challenged, after the 100th Congress had adjourned and the powers of that House had expired.

The Senate cannot condone that conduct. In our view, that conduct simply confirms and compounds the violations of the standards of fairness that have and must be observed in proper impeachment inquires and trial proceedings. In context, we believe that that conduct confirms the need for dismissal of the Articles of Impeachment by the Senate. At a minimum, we believe the Senate must enter orders requiring an accounting by the managers and excluding all evidence the House has thus gathered from any use at trial. We anticipate that a motion seeking proper remedies for the managers' conduct will be prepared and filed within a week after the Committee's scheduled hearings.

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[5] See, e.g., Evidence and Discovery Memorandum: Compensation Memorandum.

[6] A copy of that request (the "Request") has been supplied the Committee's chief counsel as well as Senate Legal Counsel.

4. If the Senate is to conduct a trial that is fair to the Senate as well to Judge Hastings, Judge Hastings must also be permitted to conduct pretrial depositions of witnesses. Otherwise, we will be compelled to call, as witnesses at trial, many persons who may have significant, material information and, in effect, to conduct discovery during the trial. Two examples should illustrate the problem.

The House chose to exclude Judge Hastings from any role in the investigative phase of its inquiry. The House chose to rely largely upon a secondhand account of the evidence given by the lawyer who acted as chief counsel for the investigation conducted within the judicial branch at its subcommittee hearings. That subcommittee called only two of the witnesses who had testified before the jury at Judge Hastings's trial. As a result there are more than 150 witnesses, who may have testimony material to the allegations made in the first fifteen Articles of Impeachment, but who have never confronted Judge Hastings or submitted to examination by his counsel. If proper discovery is not permitted before the trial begins, many of these will have to be called as witnesses and examined for the first time at trial. With proper discovery, the testimony of some might prove unnecessary; that of others might be presented more concisely. A decent respect for the time of the Senate as well as fairness to Judge Hastings dictate that counsel have an opportunity to depose such witnesses before any trial begins.

Similarly, more than 800 people, including community leaders from all walks of life, attended the conference at which Judge Hastings is alleged to have made the disclosure to Mayor Stephen P. Clark that is alleged in Article XVI. Mayor Clark has repeatedly testified that Judge Hastings left the podium after delivering the keynote address and approached the mayor who was in the first row, and that that is when and where the alleged disclosure was made. Judge Hastings has testified under oath that he did not approach Mayor Clark after his speech and that he did not disclose any information to the mayor, then or ever. At the time the House subcommittee completed its hearings, the FBI, the judiciary, and the House had not identified any person who had observed the exchange as the mayor described it. Prior to that time, however, no one had made any serious attempts to identify and interview those who attended. If these allegations are to be pursued, Judge Hastings must be permitted to produce persons who recall the event to corroborate his version of the events that took place. If he cannot narrow the field to locate those witnesses who have the necessary recollection before trial, he will be compelled to call a larger number of persons who attended the conference at trial until he has located those who can establish the point.

We submit that the posture and complexity of this case requires that the Senate establish procedures through which counsel for Judge Hastings may take appropriate pre-trial depositions of potential witnesses. The House has enjoyed a one-sided power to control the gathering and testing of testimony in preparation for trial. This can no longer be tolerated. The prior proceedings conflict with minimum standards of fairness, and the wrongs Judge Hastings has endured can never be fully redressed. It is not only a concern for Judge Hastings, but also a concern for the Senate that requires that these procedures be established now.

5. Adequate funds must be provided to enable Judge Hastings to prepare his defense and to participate fully in any trial the Senate may conduct. Judge Hastings is an *acquitted* judge. He was forced to and did bear the additional expense and other burdens incident to his successful defense at the 1983 trial. He has since been forced to bear the expense and burdens incident to his efforts to protect his rights in post-acquittal investigations over the past six years. During that period, his accusers have spent more than $2,000,000, just for the services of special counsel and staff and the direct costs incident to their further investigations. The cumulative costs to Judge Hastings have now exceeded the limits of fairness by any standard and cannot be reconciled with the protective standard that the framers sought to establish for federal judges through the guarantees provided by the Compensation Clause.[7]

Judge Hastings is now called upon to prepare once again to defend himself, largely against the same allegations, but this time on the basis of a more extensive record compiled through an additional six years of investigation. It is in the interest of all concerned that he have available the resources necessary to assure that the pretrial work be completed expeditiously and that any trial that may then be necessary be conducted in an orderly and expeditious manner. Constitutional principle and policy as well as the proper interest of the House and Senate dictate that the necessary funds be provided immediately. We developed principled and pragmatic grounds that require such support in a prior memorandum request as modest allotment of funds for that purpose, and we ask that they be considered now and the request be granted.[8]

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[7] U.S. Const., art. III, 1.

6. In view of the foregoing, we believe that the schedule established by the Senate will not afford adequate time for the pre-trial proceedings that will be required.[9] If the requested discovery material and necessary funds were made available immediately, we would have less than thirty days to review the materials, conduct such depositions as may be necessary, and complete trial preparation. Those are tasks that the House, its managers, and its paid staff have had a year and the benefits of the analysis and work product that the chief counsel to the judicial investigation compiled over a prior three-and-a-half year period. He in turn started with the products of the eighteen months' work by the Justice Department and the FBI that preceded the trial and had the assistance of the FBI throughout We do not believe that a thirty-day period to prepare would be fair to Judge Hastings or would result in an orderly or expeditious trial before the Senate. The fairness concerns should be self evident, and they have been developed in the prior memoranda we submitted. In view of the Senate's request to counsel, the latter point merits some further development here.

The allegations made in the Articles of Impeachment are presumably based upon transcripts, documents, and other materials that the House received or gathered during the course of its inquiry. Judge Hastings was not afforded an opportunity to participate in the gathering or to test the materials so collected during that inquiry. The only proceeding in which Judge Hastings has participated was the 1983 trial. That trial was conducted in open court before a jury of his peers and without significant stipulation. The government made its allegations and set out to prove them. It failed there: The jury that *heard* the testimony and *saw* the evidence as it was received found the judge not guilty. Judge Hastings did not undertake there to ease the constitutional burdens his accusers assumed when they filed their allegations, and he will not do so here.

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[8] A lack of resources over the past four months has already caused some delay and required counsel to devote time to other employments that might usefully have been devoted to the present case.

[9] We were not asked to address the time required for the conduct of necessary pretrial preparations and proceedings, and, accordingly, we did not express our views in our prior memoranda. In any event, developments over the past three months have made it possible to clarify the steps that must be taken.

The House managers have proposed stipulations that would have precisely that effect.[10] Moreover, many of those stipulations relate to testimony and documents gathered at proceedings other than the 1983 trial. Many are based upon testimonial assertions and documents whose foundation have never been tested by cross-examination. From the judge's standpoint, all are proposed by an adversary who has long had access to relevant materials that has been denied him. So long as those conditions continue, we cannot responsibly consider, recommend, or accept stipulations on the judge's behalf.

Against that background, we believe that it is unlikely that the parties will agree upon stipulations that can be published *prior* to trial. If the Senate is to impeach the jury's verdict acquitting the judge, it will only be after it has conducted a trial at which the testimony and evidence the managers now claim support the House's allegations have been presented through live witnesses who have been cross-examined in open court. Moreover, the extent of any agreement on stipulations that may be used and published *at* trial must necessarily depend upon the extent to which Judge Hastings and his counsel are satisfied that they have had fair access to all materials that may contain relevant information. The stakes are too high to suggest that Judge Hastings partake in a game where he does not have access to the full deck that is now in the control of his opponent. Unless and until that condition is satisfied, we could not responsibly review, recommend, or accept stipulations that might limit the judge's right to insist that the House carry its burden or to confront fully the evidence offered against him.

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[10] Copies were also submitted to the Committee's chief counsel as well as to Senate Legal Counsel.

We have no desire needlessly to consume the time of the judge, the managers, or the Senate. We are prepared to work with the managers to achieve stipulations for use at trial that will enable both sides to prepare and the Senate to conduct a trial that is as expeditious as the demands of fairness will permit. We are not prepared to consider or recommend any stipulation that might later adversely affect any of the judge's rights during the trial, including his right to insist that the House meet the burden the Constitution imposes upon it. Until we are satisfied that we have examined *all* the available evidence and had an adequate opportunity to conduct such tests as may be necessary to eliminate any reservations, we must view all proposed stipulations as suspect, and we will lack the access necessary to resolve our suspicions.

The Trial

We believe that the Committee should consider three additional points that bear upon the trial of this impeachment:

1. It is our firm view that the Constitution requires that the Senate, the full Senate, conduct the trial of every impeachment. The fact that the House of Lords occasionally appointed committees to take testimony from various witnesses, without recorded objection insofar as we can determine, hardly supports a different conclusion. The framers proposed and the people approved a Constitution that assigns to "The *Senate* . . . the sole power to *try* all impeachments."[11]

The framers rejected suggestions that the power be allotted to other bodies, such as the Supreme Court, on the ground that only a more numerous body could safely be entrusted with such a power. There were thirteen confederate states that participated in drafting and adopting the Constitution. All must necessarily have contemplated that the body trying an impeachment would have at least twenty-six members and would increase. The framers also rejected joint address, the legislative method for removal used in England, and in so doing, they necessarily rejected the use of legislative procedures for conducting removal proceedings. Political necessity may frequently be mother to expedient inventions, but expedience cannot justify the use of procedures for the exercise of powers in a manner that conflicts with procedures prescribed by the Constitution and their clear intent.

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[11] U.S. Const., art. I, 3, cl.6.

For the first 150 years, the Senate's conduct in trials of impeachment conformed to this intent. Those who urged the Senate to authorize the use of committees to receive evidence understood that the proposal was unlikely to withstand serious constitutional scrutiny. The fact that such a procedure has been employed once to remove the first *convicted* judge who refused to resign does not add much to the constitutional debate and provides no support for its use in proceedings to retry an *acquitted* officer.

In our prior submissions, we made it clear that the Senate might properly avoid the ultimate question here, precisely because this was the first case in which the House had asked the Senate to try an *acquitted* officer. We have developed the arguments in those prior memoranda and adopt them here. We continue to believe that the reasons developed there make it clear that a trial before the full Senate would be mandated in this case in any event. The Committee's prior report, however, suggested that we should assure that the Committee is aware of the judge's position that the Constitution requires such a trial in all cases of impeachment.

2. We have identified more than 200 witnesses who may have information that is relevant to the issues raised to the allegations made by the House and those submitted on behalf of Judge Hastings.[12] The record transmitted by the Judicial Conference included more than 2800 exhibits, most of which were submitted as relevant to the allegations made in the first fifteen articles. The House has also received the transcripts and exhibits presented to two grand juries and, in addition, a substantial number of exhibits that were relevant to the allegations made in Article XV. More than 800 persons, in addition to the nineteen who testified or were interviewed prior to the hearings before the House subcommittee, attended the conference where the disclosures alleged in Article XV were alleged to have been made. It is likely that, at a minimum, a representative sample of those persons will have to be called.

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[12] Those witnesses are listed in the addenda to the Request, a copy of which was supplied to the Committee's chief counsel. See note 6 above.

Insofar as the available records reflect, this is the pool of persons and exhibits from which the parties must select the witnesses whose testimony, and the documents and other material which, will be offered at trial. Absent discovery and further specification by the House, we can only suggest that the Committee refer to the descriptions provided of the *Borders* trial (more than twenty witnesses), the *Hastings* trial (more than forty *additional* witnesses), and the House subcommittee hearings in the Mayor Clark allegations were considered (six witnesses) as a base.

Against that base, the Committee should consider three additional points in estimating the duration and extent of the trial that the Senate may have to conduct. First, the House's allegations seek to extend the period relevant to the issues posed by the allegations in Article I, from the one-month period preceding Borders's arrest to the nine-month period preceding the arrest. Second, the allegations in Article XV raise issues that will necessarily involve calling a number of witnesses that is significantly greater than the nineteen who have testified or whose interviews have been noted in the record and thus identified as having relevant information. Third, the evidence now available and the affirmative allegations Judge Hastings has submitted make it clear that the Senate will have to hear and have to consider a considerable body of testimony and other evidence in order to resolve issues which were not developed at trial or meaningfully explored in the post-acquittal investigations, but that must be resolved on the allegations now before the Senate.

3. These considerations bear upon an additional point developed in our prior memoranda. In our view, much of the evidence concerning certain crucial issues would not be admissible in a court or in the trial of an impeachment under either the common law or federal rules of evidence. The managers may disagree, but surely it is in the interest of both parties and of the Senate that the Senate provide such guidance as is feasible concerning the rules to be applied and the manner of their application. We submit that the Senate should make it clear that, whatever rules are applied, they will be as strictly applied in the trial of this impeachment, as they have been in the trial of past impeachments. We have developed these points in a prior memoran-

dum.[13] We add here only that a strict and even-handed application of those rules in this case may constitute the primary means by which the Senate may properly regulate the quantity of the evidence it will be forced to consider and to force the parties to narrow their claims to those that can be proved on the basis of competent evidence that would be admitted in a court of law.

Conclusion

In this statement and in our prior memoranda, we have identified and described pretrial and trial procedures that are either mandated directly by the Constitution or are necessary to assure a trial that comports with the standards of fairness mandated by the Constitution. We believe that the procedures suggested would also serve the interests of the Senate and the parties in an orderly and expeditious trial, within the constraints imposed by the Constitution.

It is hard to do it right. Here, as elsewhere, it must be tempting to seek shortcuts. Here, as in most constitutional endeavors, the shortcuts suggested would be improper. We recognize that doing the trial of this impeachment right will impose substantial burdens upon the time and attention of the Senators. We trust that the Senators will recognize that the investigations and proceedings over the past seven years have imposed burdens on the judge that are unprecedented in their severity and effect. He has endured for seven years burdens he believes to have been largely unconstitution. We submit that doing it right now requires the Senators to endure only those burdens mandated by the Constitution and their oaths of office.

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[13] Evidence and Discovery Memorandum.

F. JUDGE HASTINGS' MOTION(S) TO DISMISS ARTICLES

The Committee has been advised that Judge Hastings intends to file motions to dismiss Articles of Impeachment. As part of their pretrial proceedings pursuant to S. Res. 480, the parties have agreed on dates for the filing of such motions and responsive pleadings: motions will be filed by February 10, 1989, the Managers' responsive brief by February 24, 1989 and the Judge's rebuttal by March 3, 1989.

The recommendations made in this report are in response to the charge to this Committee set forth in S. Res. 480 and are based on the assumption that there will be Articles to be tried in the Senate. The Committee believes that fairness to all parties, including the Senate, requires that it consider and make a recommendation regarding the procedure for hearing such motions during this impeachment proceeding.

The Committee recommends that motions that may be dispositive of any article of impeachment which do not require the taking of evidence should be filed and argued before the full Senate before the Senate undertakes the appointment of an impeachment committee. The charge to such a committee would, then, be limited to hear testimony and receive evidence regarding those articles of impeachment that were not dismissed. The second original resolution reported herein provides for the filing and argument of motions by Judge Hastings to dismiss articles of impeachment.[47]

G. RULES OF EVIDENCE

Respondent has requested that the Senate state whether the Federal Rules of Evidence or common law rules of evidence will apply in the Senate proceedings. The Committee finds that no such declaration should be made by it. Any such determination should be made by the body that hears the evidence in the case.

"The Rules of Impeachment" by Stanley Futterman, 24 Kan. L. Rev. 105 (1975) contains a discussion of the evidentiary rules used by the Senate in impeachment proceedings. Futterman states, ". . . the Senate has understood itself to be making evidentiary determinations under the rules of evidence applicable in courts of law the equity.[48]

In the past, the Senate has determined the admissibility of evidence by looking to Senate precedents rather than court decisions. A Senate vote is the ultimate authority for determining the admissibility of evidence.[49]

In the Claiborne impeachment proceedings, the House managers argued that the Senate is not bound by the Federal rules of Evidence, but they suggested that those rules should be looked to for guidance. The managers were careful to cite to the analogous federal rule when arguing motions.[50]

Professor Burbank concludes that the Claiborne proceedings confirmed the Senate's wisdom in refusing to adopt detailed rules of evidence for impeachment trials and cautions against wholesale borrowing from the Federal Rules of Evidence.[51] Burbank stated, "It is not hard to imagine a trial governed by a detailed body of rules becoming bogged down in technical disputes, with the ascertainment of facts the victim." [52]

Although the Senate applies generally accepted rules of evidence, it would serve no useful purpose to declare any particular system to be supreme. *Impeachment: A Handbook,* (1974) by Professor Charles Black of Yale University, discusses the entire impeachment process. Professor Black suggests that technical rules of evidence designed for juries have no place in the impeachment process.

> Both the House and the Senate ought to hear and consider *all* evidence which seems relevant, without regard to technical rules. Senators are in any case continually exposed to 'hearsay' evidence; they cannot be sequestered and kept away from newspapers like a jury. If they cannot be trusted to weigh evidence, appropriately discounting for all the

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[47] See Appendix C for text of S. Res. 39, 101st Congress, 1st Session.
[48] *Id.*, 112.
[49] *Cannon's Precedents, supra,* § 491.
[50] See S. Hrg. 99-812, Part 1, *supra,* 70–71, 73.
[51] Burbank, "Removal of Federal Judges", *supra,* 692.
[52] *Id.*, 693.

> factors of unreliability that have led to our keeping some evidence away from juries, then they are not in any way up to the job, and 'rules of evidence' will not help.[53]

Simpson in "Federal Impeachments", *supra,* discussed rules of evidence in impeachment proceedings. Simpson noted:

> . . . the Senate has invariably received all the evidence which it deemed relevant, from any witness who had personal knowledge of the facts, no matter by whom it was to be proved, and left its weight to be determined upon final consideration.[54]

The Senate must retain its freedom to review evidence issues as they present themselves. The Senate should not restrict itself unnecessarily by making its decision in a vacuum, before the trial has even begun.

H. OTHER FAIR TRIAL ISSUES

The House Managers have recommended that the impeachment committee's proceedings should be videotaped to provide an additional means to examine the credibility of witnesses and to overcome other objections to impeachment proceedings before a committee instead of before the full Senate. The Claiborne proceedings were televised to all Senate offices and videotapes were available to Senators.

For the reasons set forth fully in its discussion of the use of an impeachment committee, the Committee believes that the proceedings of the impeachment committee should be televised to all Senate offices and videotaped, and that such videotapes should be made available to Members so that they may examine the proceedings as their schedules permit, without disruption of the other legislative responsibilities of the Senate during this trial.

The Committee finds that the Senate can also assure that Senators have an opportunity to familiarize themselves with the case by delaying floor consideration of the articles of impeachment for a period of time after the parties have concluded their cases before the committee.

During the Claiborne trial, concern was expressed about the lack of time Senators had to review the record before full Senate consideration of the case. Respondent intimates that he will not receive a fair trial if a committee is used to receive evidence because the Senators will not take time to examine transcripts or videotapes prior to full Senate action.

Allowing a period for weighing the evidence will remove even the suggestion that the Senate does not wish to devote the necessary time to the case. By the same token, providing a period for reviewing the evidence will allow the nation's business to go forward. Such a procedure is common practice in the Senate. Hearings are routinely held months before legislation is marked up and voted upon in committee. Frequently, the full Senate vote is taken months after the legislation is reported. In the context of impeachments there is also precedent for delaying the vote on articles of impeachment.

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[53] *Id.*, 18 (emphasis in the original).

[54] *Id.*, 819.

The original resolution regarding the appointment of an impeachment committee also includes a provision that would authorize that committee to provide Members with a summary of the evidence reported by the committee to the Senate. Such a summary should assist the Members in their review of the record and preparation for the Senate trial.

I. COUNSEL FEES FOR JUDGE HASTINGS

Counsel for Judge Hastings has asked for funds for the costs of his defense in the Senate trial. Judge Hastings' counsel testified, and the Committee concurs, that the payment of fees in impeachment cases is unprecedented. In fact, in the case of Judge Swayne, the judge was acquitted and his request for counsel fees was denied by the Senate.[55] The Committee notes that Futterman, in his article, "The Rules of Impeachment", urged that public funds be used to pay reasonable defense expenses. Nevertheless, Futterman stated, "No provision has ever been made for the government to pay the expenses of the respondent." [56]

Although the Senate has never paid counsel costs, the Committee notes that the Senate has, in the Claiborne impeachment, taken steps to reduce the costs for the impeached party by paying reasonable travel and per diem expenses for all witnesses, as well as all duplication and printing costs.

The payment of respondent's counsel's costs is within the discretion of the Senate. This Committee makes no recommendation on this issue.

J. OTHER REQUESTS BY PARTIES FOR RECOMMENDATIONS REGARDING "FAIR TRIAL" MATTERS

The parties have made a number of other requests that the Committee believes should be decided at a later date, either by the Rule XI committee or by the full Senate.

The parties disagree on the amount of pretrial discovery that should be granted in this case. The respondent has also asked to be permitted subpoena power and the opportunity to conduct pretrial depositions and for more time to prepare his case. He has also suggested that the House should be sanctioned for its conduct in the investigation of this case. These issues should be determined by the body that hears the evidence.

Similarly, the dispute concerning stipulations and the House Managers' Motion *in Limine* should be resolved by the impeachment committee of the Senate. In each instance, the decision relates to the evidence and to the trial of the merits of the case, matters which are beyond the scope of this Committee's inquiry.

Several other requests from the parties also relate to evidentiary issues and must be deferred until the case has evolved more fully. For example, the managers request that, if a committee hears the evidence, it be given explicit authority to determine all evidentiary issues.

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[55] 3 A. Hinds, *Hinds' Precedents of the House of Representatives* § 2024 (1907).

[56] Futterman, "The Rules of Impeachment", *supra*, 109.

This Committee has no way of knowing what sort of evidentiary issues may arise as the case develops. Evidentiary issues may arise that should not be decided by the Rule XI committee. In any event, if a Rule XI committee is appointed, it will be in a much better position to judge whether such authority is required.

The managers request that all evidence be heard by one body, either a committee or the full Senate. For the reasons set out above, such a determination cannot be made at this time. There may be some witnesses whose testimony should be heard by the whole Senate, even if a Rule XI committee is used. Certainly, until the Senate reviews the record from the Rule XI committee, the Senate will not be in a position to know whether any witness should be recalled. There is no justification for this Committee to recommend that the Senate agree at this time not to exercise its right to call witnesses, a right it has specifically reserved to itself in impeachment Rule XI.

K. RECOMMENDATIONS AS TO FAIR TRIAL ISSUES

With respect to "any other matter which may assist the Senate in a fair trial of the pending impeachment", the Committee recommends that:

1 The Senate set a date to hear the dispositive motions and decide them before the Rule XI committee is appointed. Such a procedure will assist the parties and the impeachment by determining whether the Rule XI committee may narrow the focus of its inquiry.

2. Videotapes of the proceedings before the Rule XI committee at which admissible evidence was presented be made and distributed to each Senator. The tapes may be indexed or cross-referenced to transcripts, to inform Senators where they may find the testimony of witnesses, arguments on motions and rulings of the committee.

Providing Senators with a comprehensive record will permit them to thoroughly review the case without unduly delaying the nation's legislative business. Coupled with the Committee's other recommendations, this procedure will also allow Senators to take a meaningful part in the work of the Rule XI committee.

3. The Senate delay the commencement of any floor proceedings for a reasonable period of time after the committee's report and summary of the evidence is available to the Senators so that they have ample time to consider the evidence and argument.

4. The impeachment committee be authorized to report to the Senate a statement of facts that are uncontested and a summary of evidence that the parties have introduced on contested issues of fact. The summary of evidence should make appropriate references to the record.

COMMITTEE'S ROLLCALL VOTE

In compliance with paragraph 7(b) and (c) of the rule XXVI of the Standing Rules of the Senate, the record of the rollcall vote in the Committee on Rules and Administration during its consideration of the original resolutions to report them both favorably was as follows:

YEAS (9)	NAYS (0)
Mr. Ford	
Mr. Pell	
Mr. Byrd	
Mr. Inouye	
Mr. DeConcini	
Mr. Gore*	
Mr. Moynihan	
Mr. Dodd*	
Mr. Adams	
Mr. Garn	
Mr. McConnell	

*By proxy.

The following Senator wishes to be recorded that had he been present he would have voted in favor of both original resolutions:

Mr. McClure

APPENDIX A

100TH CONGRESS
2D SESSION

S. RES. 480

[Report No. 100–542]

To carry the impeachment proceedings against Judge Alcee L. Hastings over to the 101st Congress.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 22 (legislative day, SEPTEMBER 7), 1988

Mr. FORD, from the Committee on Rules and Administration, reported the following original resolution, which was placed on the calendar

SEPTEMBER 30 (legislative day, SEPTEMBER 26), 1988

Considered and agreed to

RESOLUTION

To carry the impeachment proceedings against Judge Alcee L. Hastings over to the 101st Congress.

Resolved, That proceedings in the impeachment of Judge Alcee L. Hastings, a Judge of the United States District Court for the Southern District of Florida, shall be continued into the 101st Congress and resumed at a date in that Congress that shall be designated by the Senate.

SEC. 2. The Committee on Rules and Administration shall conduct, during the week of January 23, 1989, a hearing on—

(1) the appropriate use of Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials in the impeachment of Judge Alcee L. Hastings; and

(2) any other matter which may assist the Senate in a fair trial of the pending impeachment,

and shall report its recommendation to the Senate on or about February 1, 1989.

SEC. 3. Counsel to the parties to the impeachment shall be prepared by March 1, 1989, or as soon thereafter as the Senate determines testimony should be heard, to present their evidence in the forum to be designated by the Senate after receiving the recommendation of the Committee on Rules and Administration.

SEC. 4. Counsel to the parties to the impeachment are requested to work together to stipulate to evidentiary matters that are not in dispute, including stipulations as to documents, and shall jointly report, by February 20, 1989, on the stipulations to which such counsel have agreed, and on any other matter which such counsel agree may facilitate the resolution of this impeachment.

SEC. 5. The Senate Legal Counsel shall work with counsel to the parties to the impeachment to assist the counsel in resolving amicably issues that relate to stipulations about evidence and other matters concerning preparation for the trial of this impeachment.

APPENDIX B

Calendar No. ____

101st CONGRESS
1st Session

S. RES. 38

[Report No. 101-____]

IN THE SENATE OF THE UNITED STATES

February____, 1989

Mr. Ford, from the Committee on Rules and Administration, reported the following original resolution; which was read twice and placed on the calendar

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RESOLUTION

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Judge Alcee L. Hastings.

Resolved, That pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve senators to perform the duties and to exercise the powers provided for in the rule.

Sec. 2. The Majority and Minority Leader shall each recommend six members to the Presiding Officer for appointment to the committee. The committee shall designate one of its members to be chairman and one of its members to be vice chairman.

SEC. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under Rule XI.

SEC. 4. During proceedings conducted under Rule XI the chairman of the committee is authorized to waive the requirement under the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the presiding officer.

SEC. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

SEC. 6. Necessary expenses of the committee shall be paid from the contingent fund of the Senate from the appropriation account ''Miscellaneous Items'' upon vouchers approved by the chairman of the committee.

SEC. 7. The Secretary shall notify the House of Representatives and counsel for Judge Alcee L. Hastings of this resolution.

APPENDIX C

Calendar No. ____

101st CONGRESS
1st Session

S. RES. 39

[Report No. 101–___]

IN THE SENATE OF THE UNITED STATES

February____, 1989

Mr. Ford, from the Committee on Rules and Administration, reported the following original resolution; which was read twice and placed on the calendar

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RESOLUTION

To provide for the filing and argument of motions by Judge Alcee L. Hastings to dismiss articles of impeachment.

Resolved, That on a date designated by the Majority Leader in consultation with the Minority Leader, the Senate shall resume its consideration of the articles of impeachment against Judge Alcee L. Hastings for the purpose of hearing argument on a motion or motions by Judge Hastings to dismiss the articles.

Sec. 2. Counsel for Judge Hastings shall file with the Secretary of the Senate on or before February 10, 1989, any motion to dismiss the articles of impeachment. The Managers on the part of the House shall file with the Secretary on or before February 24, 1989, their response to any such motion. Counsel for Judge Hastings may file a reply with the Secretary on or before March 3, 1989.

SEC. 3. There shall be printed as one of several Senate documents under the direction of the Secretary of the Senate, in consultation with the Senate Legal Counsel—

(1) the briefs of the parties on any motion to dismiss the articles of impeachment; and

(2) material that would assist the Senate in the consideration of any such motion, including the articles of impeachment, Judge Hastings' answer to them, the replication of the House of Representatives, the provisions of the Constitution on impeachment, and the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

SEC. 4. The Secretary shall notify the House of Representatives and counsel for Judge Hastings of this resolution.

APPENDIX D

99TH CONGRESS
2D SESSION

S. RES. 481

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Harry E. Claiborne.

IN THE SENATE OF THE UNITED STATES

AUGUST 14 (legislative day, AUGUST 11), 1986

Mr. DOLE (for himself and Mr. BYRD) submitted the following resolution; which was considered and agreed to

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RESOLUTION

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Harry E. Claiborne.

Resolved, Pursuant to rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve Senators to perform the duties and to exercise the powers provided for in the rule.

SEC. 2. The Majority and Minority Leader shall each recommend six Members to the Presiding Officer for appointment to the committee.

SEC. 3. Necessary expenses of the committee shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee.

Sec. 4. The committee shall be deemed to be a standing committee of the Senate for the purpose of printing reports, hearings, and other documents for submission to the Senate under rule XI.

Sec. 5. The Secretary shall notify the House of Representatives of this resolution.

APPENDIX E

U.S. SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC, August 10, 1988.

Hon. PETER W. RODINO, Jr.,
House of Representatives, Washington, DC.

Prof. TERENCE J. ANDERSON,
University of Miami School of Law, Coral Gables, FL.

DEAR MANAGER RODINO AND PROFESSOR ANDERSON: The Committee on Rules and Administration has been directed to report to the Senate by September 23, 1988, "on (a) the authority of the Senate to continue in the next Congress proceedings on the impeachment of Judge Alcee L. Hastings; (b) the appropriate use, in the pending impeachment, of Senate Impeachment Rule XI; and (c) any other matter which may assist the Senate in a fair trail of the pending impeachment." We would very much appreciate receiving from the parties memoranda which set forth their views on each of these matters.

It would be particularly helpful if the portion of your submissions addressed to item (b) included, in as much detail as is possible at this time, how many witnesses each side expects to call, the general nature of the testimony that is expected from each of them, and the amount of time that each side expects to require for the presentation of its case. We recognize that neither side should be precluded, by its submission of this preliminary information, from requesting process for other witnesses. It will be important to the Senate, however, in establishing procedures for the trial of this impeachment, to have adequate information about the evidence that the parties now intend to present.

Another matter on which information would be helpful to us is whether either side anticipates calling one or several witnesses who may assert a testimonial privilege, and whether immunity for any of those witnesses may be required and whether proceedings should be authorized to obtain their testimony.

In describing issues of particular concern to us we do not mean to limit the matters which you may address. Please provide us with any suggestions that you have for the fair and expeditious trial of this impeachment.

The Committee is scheduled to meet on September 20 to consider its report on the questions submitted to it. Your memoranda should be submitted to the Committee by close of business September 6. Upon receipt of your memoranda, the Committee will decide whether to hold a hearing before its September 20 meeting. You will be advised as soon as possible as to the date of such a hearing should the Committee determine to have one.

Your assistance to the Committee will be greatly appreciated.

Sincerely,

WENDELL H. FORD,
Chairman.
TED STEVENS,
Ranking Minority Member.

APPENDIX F

U.S. SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC, September 8, 1988.

ALAN BARON, Esq.,
Special Counsel for Managers, Judiciary Committee, House of Representatives, Washington, DC.

Prof. TERENCE J. ANDERSON,
University of Miami, School of Law, Coral Gables, FL.

DEAR MR. BARON AND PROFESSOR ANDERSON: Thank you for your comments regarding the subjects on which this Committee has been directed to submit a report to the Senate. Your views will be helpful to the Committee in its consideration of this report.

We would welcome additional comments from each of you in response to those that have been submitted by opposing counsel. Please feel free to make whatever comments you wish to make in response to each other's statements. In particular, however, we would find helpful:

(a) Judge Hastings' views on the House Managers' statements regarding bifurcation of the Senate trial process (Page 8), and their suggestions regarding methods of assuring that Members are kept informed during proceedings of a Rule XI committee (Page 9); and

(b) the House Managers' comments on Judge Hastings' second statement in favor of a full Senate trial (Pages 7–14, Rule XI memorandum), and his suggestion regarding pre-trial discovery (Pages 7–8, procedure memorandum).

The Committee would further request that you submit comments on each other's positions on what legitimately can be done by the Senate in this proceeding between now and the convening of the next Congress.

Also, we would appreciate any additional statements Judge Hastings may find he can make regarding witnesses on his behalf in light of the statements made by House Managers on that subject.

Would you please deliver your additional comments, in print ready format, to the Committee by close of business, Tuesday, September 13, 1988, so that they may be included in the Committee's report.

Your assistance to the Committee will be greatly appreciated.

Sincerely,

WENDELL H. FORD,
Chairman.
TED STEVENS,
Ranking Minority Member.

APPENDIX G

U.S. SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC, December 12, 1988.

Hon. PETER W. RODINO, Jr.,
House of Representatives, Washington, DC.
Prof. TERENCE J. ANDERSON,
University of Miami, School of Law, Coral Gables, FL.

DEAR MANAGER RODINO AND PROFESSOR ANDERSON: The Committee on Rules and Administration has been directed to report to the Senate on or about February 1, 1989, "on (1) the appropriate use of Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials in the impeachment of Judge Alcee L. Hastings; and (2) any other matter which may assist the Senate in a fair trial of the pending impeachment." The Committee has before it the materials submitted by the parties for its meeting of September 20, 1988. We would very much appreciate receiving from the parties any additional memoranda they may wish to submit to enlarge upon or supplement their previous memoranda on these matters.

It would be helpful to the Committee in its consideration of these matters to have before it any motions and supporting briefs that either party intends to submit that should be heard before the taking of evidence in the trial. We also request that each party update its previous submissions to include, in as much detail as is possible at this time, how many witnesses each side expects to call, the general nature of the testimony that is expected from each of them, and the amount of time that each side expects to require for the presentation of its case. We recognize that neither side should be precluded, by its submission of this additional preliminary information, from requesting process for other witnesses. It will be important to the Senate, however, in establishing procedures for the trial of this impeachment, to have adequate information about any possible motions that should be heard before the taking of testimony as well as the evidence that the parties now intend to present.

If there is any change from either party's previous submission, we would appreciate advice as to whether either party now anticipates calling one or several witnesses who may assert a testimonial privilege, and whether immunity for any of those witnesses may be required and whether proceedings should be authorized to obtain their testimony.

In describing issues of particular concern to us we do not mean to limit the matters which you may address. Please provide us with any additional suggestions that you may have for the fair and expeditious trial of this impeachment.

The Committee is scheduled to hear this matter on January 24, 1989, at 9:30 a.m. in Room 301, Senate Russell Office Building. In order to allow adequate time for Members' questions, each party will be allowed one-half to present its testimony. Your memoranda and testimony should be submitted to the Committee, in the usual committee format, by close of business January 13, 1989. Each party should submit 50 copies of the full text of its statement and executive summary of no more than three pages. Each party should send a copy of all its submissions to the other party at the same time they are submitted to the Committee. You should be aware that, in addition to the parties, the Committee may hear other persons who request to testify on this matter.

Your assistance to the Committee will be greatly appreciated.

Sincerely,

WENDELL H. FORD,
Chairman.
TED STEVENS,
Ranking Minority Member.

APPENDIX H

Testimony of the House Managers (Jack Brooks, John Conyers, Jr., Don Edwards, John Bryant, Hamilton Fish, Jr., and George W. Gekas) on Behalf of the House of Representatives Before the Senate Committee on Rules and Administration, January 26, 1989

I

On behalf of the House of Representatives, we would like to thank the Senate Committee on Rules and Administration for the opportunity of presenting our views as to what procedures the Senate may want to employ in the impeachment trial of Judge Alcee L. Hastings. The House recognizes that it is within the Senate's sole discretion to establish the governing procedures. The suggestions we make here today are just that—suggestions—of procedures the Senate may want to consider in order to ensure a fair and timely resolution of the pending case.

As we have made clear in our written submissions to the Committee, the House of Representatives suggests that the Senate adopt a two stage process. The first stage would be a pretrial proceeding, during which any motion that seeks to dispose of one or more of the Articles of Impeachment would be briefed and argued by the parties, and subsequently resolved by the Senate. We believe that the full Senate would have to decide any dispositive motions; however, either the full Senate or a committee could oversee the briefing schedule and conduct a hearing during which the arguments of the parties would be presented. If the Senate chooses to use a committee during this part of the impeachment proceeding, it could also ask the committee to make a recommendation on the motions.

The second stage of the pending impeachment would be the presentation of evidence. During the second stage, pretrial matters of more limited scope would be resolved, the trial would be conducted and all evidentiary motions would be briefed, argued and decided. The House of Representatives takes no position with respect to whether the trial should be conducted before the full Senate or a Committee appointed pursuant to Rule XI of the Senate Impeachment Rules. We are prepared to present our case before whichever body the Senate chooses to hear the evidence. If, however, the Senate appoints a Committee pursuant to Rule XI, we suggest that it be explicitly authorized to resolve all evidentiary matters.

Our major concern with respect to the second stage of the pending impeachment is that the trial be conducted before a single body. In other words, the House urges this Committee to recommend to the Senate that *all* the evidence should be presented to either the full Senate *or* to a Rule XI Committee, but not to a combination of the two. We feel this is an important procedure to adopt because bifurcating the presentation of the evidence runs a significant risk that more weight will be given to the evidence presented to the full Senate than to that presented to the Committee. In addition, there is the risk that evidence may be taken out of context and different evidentiary standards may be applied. In order to avoid these results and to ensure that the impeachment trial is fair to both parties, the House of Representatives asks this Committee to recommend a procedure whereby all the evidence would be presented to a single body.

Finally, the House suggests two additional procedures which we believe would contribute to the expeditious resolution of the trial. First, we ask the Committee to recommend to the Senate a rule establishing that any proposed stipulation of fact filed with the Senate by one of the parties to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation of fact should not be taken as true. Such a rule would eliminate the need for testimony concerning facts that are not seriously in dispute.

Second, the House suggests a similar procedure with respect to the many documents that are part of this case. We suggest the adoption of a rule whereby any stipulation as to the admissibility of a document, which is filed with the Senate by one of the parties to this proceeding, be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true.

We believe that both of these procedures, along, with the others we have mentioned, will help ensure a timely and just resolution of the pending impeachment proceeding.

II

On behalf of the House of Representatives, we would like to emphasize that the House does not take a position on the issue of whether Judge Hastings' trial should proceed before the full Senate or before a Committee appointed pursuant to Rule XI of the Senate Impeachment Rules. The House recognizes the Senate's authority to choose either alternative and there is ample precedent for both: early impeachment trials were conducted before the full Senate; more recently, in 1986, a Committee was appointed pursuant to Rule XI in the impeachment of Judge Harry Claiborne. The House is prepared to bring its case before whichever body the Senate chooses to hear the evidence.

In his written submissions to this Committee, Judge Hastings has argued extensively that the full Senate should hear the evidence because the procedures employed by the House of Representatives in its impeachment proceeding were unfair to the accused and did not adhere to constitutional principle.

As the Managers for the House of Representatives, we must take issue with Judge Hastings' characterization of our proceedings. We would be lax in our duties if we did not defend the House of Representatives against such a charge.

There is absolutely no basis for the contention that the procedures employed by the House require this case to be tried before the full Senate, for the House conducted its investigation in a manner that was fundamentally fair, consistent with precedent and, most importantly, protective of the rights of the accused.

What the respondent fails to recognize is that our role was a limited one. Pursuant to Article I, section 2 of the Constitution, the House of Representatives was to conduct a factual investigation to determine whether Articles of Impeachment should be brought. We engaged in the first stage of the constitutional process. We were not to conduct a trial, for that is the Senate's exclusive constitutional function. We discharged our duty with fairness and from a position of neutrality.

Like any other type of investigation, the House investigation into the facts of this case did not employ trial procedures. To use such procedures would have been inappropriate. The Subcommittee on Criminal Justice, however, wanted to make sure that Judge Hastings' views were presented. For this reason, we allowed him and his counsel to participate fully in our hearings, including the questioning and calling of witnesses. Judge Hastings addressed the Subcommittee and we gave him the opportunity to develop additional information for our review. Our investigation proceeded in a manner consistent with precedent and with a concern for fundamental fairness.

The House of Representatives' investigation led to the conclusion that Judge Hastings should be impeached. The evidence establishes that his conduct warrants removal from office. The Managers therefore, are ready to bring before the Senate the case against Judge Hastings. We will present the evidence before the full Senate or a Committee appointed pursuant to Rule XI of the Senate Impeachment Rules, whichever body the Senate chooses.

III

In this impeachment proceeding, the Senate must determine whether Judge Hastings has committed the acts alleged and whether those acts constitute high crimes and misdemeanors warranting removal from office.

In his submissions to this Committee, Judge Hastings emphasizes his acquittal by a criminal jury on the allegation that he participated in a conspiracy to accept a bribe. He argues that this jury verdict requires the Senate to proceed with an impeachment trial before the full body.

It is the position of the House of Representatives, however, that the acquittal should play no part in these proceedings. In both a legal and constitutional sense, the jury verdict is irrelevant to your decision regarding what procedures to recommend and to your ultimate decision whether to convict Judge Hastings on any of the Articles of Impeachment.

The trial that the Senate will conduct in this case is neither dependent upon nor related to the criminal trial. Many of the articles presented by the House of Representatives contain charges that were never decided by the jury. More importantly, the Constitution itself establishes, in Article I, section 3, clause 7, that the impeachment trial is independent of the criminal case. Finally, the Senate's impeachment trial and the criminal prosecution serve two very different and important functions. The primary goal of a criminal proceeding is personal punishment. The impeachment process, in contrast, is remedial in nature. It serves the entirely different purpose of having the Legislative Branch determine whether the conduct of a public officer, in this case a Federal judge, has betrayed the trust of the American people and has compromised the public's trust in our Government. Unlike any criminal proceeding, the Senate impeachment trial will ensure the integrity of the Federal judiciary.

As Chairman Peter W. Rodino, Jr. remarked when the Committee on the Judiciary of the House of Representatives was considering the seventeen Articles of Impeachment in this case:

> It is clear that the impeachment process is separate and distinct from the criminal law process. The fact of a prior acquittal on criminal charges does not prevent or limit the Congress from invoking the remedy of impeachment where appropriate. . . . The American people look to us to protect them from persons holding public office who are unfit to serve by virtue of serious misconduct constituting a violation of the public trust.

In 1986, the Senate decided in the proceedings on the impeachment of Judge Harry Claiborne that it could not delegate to the courts its constitutional function of preserving the integrity of our judicial system. Thus, in the Claiborne case, the Senate voted that the respondent's criminal conviction was not, in itself, a basis for removal from office. Rather, the Senate had to create its own record and independently determine whether Judge Claiborne had engaged in misconduct which warranted removal from office.

In this regard, Senator Charles Mathias, the Chairman of the Committee that heard the evidence in the Claiborne case, stated "We, not members of the judicial branch, will be the sole judges of the facts and the law which are germane to our constitutional responsibilities."

The same is true in this case. The jury verdict in a criminal proceeding has no role in deciding the procedures that should be adopted by the Senate and is irrelevant to the Senate's determination of whether Judge Hastings should be removed from office.

APPENDIX I

TESTIMONY OF TERENCE J. ANDERSON ON BEHALF OF UNITED STATES DISTRICT JUDGE ALCEE L. HASTINGS BEFORE THE UNITED STATES SENATE COMMITTEE ON RULES AND ADMINISTRATION

Mr. Chairman and members of the Committee, there are four propositions before you whose truths should be self-evident:

1. The trial of *this* impeachment must be conducted before the full Senate; a committee will not do.
2. The House, through its managers, must carry the burden of competently proving its accusations; neither they nor the Senate may properly call upon the *accused* to ease that burden; the suggested stipulation process will not do.
3. Judge Hastings must be assured access to the full deck and the power to gather evidence necessary for his defense; the House's claim to hold a continuing monopoly over access to the evidence and the subpoena power will not do.
4. Fairness requires that the Senate provide funds and time sufficient for a proper defense; Judge Hastings has borne burdens too heavy, too long, and that will not do.

The materials before you suggest that none of these propositions is self-evident to my colleagues representing the House. I hope I will have the opportunity to satisfy you of their truth this morning, because in my view the central issue is also self-evident:

Should the Senate, in this case of impeachment, sell its constitutional soul and honorable traditions, as well as a judge's rights, in exchange for efficiency and political expediency?

I hope the answer is self-evident—at the end of the morning, if not now. But let me begin with some basics.

Cases of impeachment are criminal cases. They are cases in which the House prosecutes a citizen who has been entrusted with an office of trust and honor by the United States. The House alleges, *and must prove,* that the accused is guilty of "Treason, Bribery, or other high Crimes and Misdemeanors." The Senate does not remove the officer from office; it convicts or acquits the officer; removal is merely established as the punishment that follows automatically upon the entry of a judgment of conviction. But the Senate has discretion to punish further. It may order that the convicted citizen be forever barred from holding "any office of honor, Trust or Profit under the United States." And for one who has held a position of high honor, that was intended as and remains a punishment more severe than death, as surely the members of this honorable body must know.

The Constitution entrusted the power to *try* cases of impeachment to the Senate because these criminal cases were the most serious and important species of criminal cases—too serious and too important to be entrusted to the courts. But with that awesome power, the Constitution entrusted also an awesome responsibility: The Senate must set aside the legislative business and conduct a trial—a trial that affords the House an opportunity to prove its accusations, and a trial that affords the accused the rights and protections afforded all who are accused of committing high crimes and misdemeanors. The Senate must set aside the legislative process also, for upon each of its members is conferred the power that God conferred upon Solomon—the power to do judgment. On the day of judgment, each Senator must execute the special oath taken and judge whether the evidence has proved that the accused was guilty of the high crimes alleged.

My children, your children, our fellow citizens, you and I: We all know the essential characteristics of a criminal trial. The accuser must be afforded an adequate opportunity to present competent testimony and other evidence in support of its accusations. This must be done in the presence of the jurors who will decide the case. The accused must be afforded the opportunity to confront the witness and the other evidence. This must be done in the presence of the jurors who will decide the case. He must be allowed to confront and cross-examine the witnesses in the presence of the jurors so that their demeanor and credibility may be observed. He must be allowed to object, so that improper testimony and evidence may be excluded and never permitted to infect the jurors' minds. He must be afforded the opportunity to challenge his accuser's evidence as inadequate, when the prosecutors rest.

My children, your children, our fellow citizens, you and I: We all know that it is only *after* the accuser has met its initial burden that the accused must, for the first time, assume the burden of proceeding. Then and only then may the accused be properly called upon to present evidence in support of his innocence. And when all the proper evidence from both sides has been *heard* and *seen,* there is a further step that must be taken. The accuser and the accused must be afforded a fair opportunity to review and comment upon testimony still fresh in the jurors' minds. They must be permitted to engage the jurors and the evidence in order to persuade the jurors where truth lies, where justice may be found.

My children, your children, our fellow citizens, you and I: We all know that all this must be done under the gaze of the public. The accused must have a public trial. The public, not just the parties, are entitled to watch in order to satisfy themselves that the jurors paid proper attention to the testimony and other evidence. Jurors and judges must be held accountable for having done the job right: How else can the Nation or the parties have confidence in the outcome?

And it is only after the job has been done right, and has been seen to have been done right, that the jurors are permitted to retire from public scrutiny and deliberate upon the evidence, as each heard and saw it. It is only from such deliberation, among those with equal knowledge, that judgments that are just to the accuser, just to the accused, and just to the public may come.

The Senators must assume Solomon's burden in this case of impeachment. They must exercise the power of judgment. They must execute the duties imposed upon them by the Constitution, by their oaths of office, and by the special oath they took to do impartial justice in all things appertaining to the trial of this impeachment. If there is to be a trial, a trial that is fair, the Senators, not their staffs, must pass judgment based upon the testimony and evidence. Those who would pass judgment on Alcee L. Hastings must do, and must be seen to do, what the jurors who passed judgment six years ago did and were seen to have done.

Mr. Chairman, the tape I brought bears directly on these points and may easily substitute for several thousand of my words. It is self-explanatory, and I would ask that it be shown now:

[The following is the transcript of an edited panel discussion prepared as part of a weekly television show, "You and the Law" produced by Tally-Ho Productions, Inc. It was recorded last September. It is presented with permission.]

> Bret S. Clark. Hello, and welcome once again to "You and the Law." Today, we have a very special topic and a very special set of guests. We are going to be discussing the trial of Alcee Hastings, the second trial of Alcee Hastings, the judge who currently sits on the bench for the United States District Court for the Southern District of Florida. Joining us is Judge Alcee Hastings. Hello, Judge.
>
> Judge Hastings. My pleasure being here with you.
>
> Clark. Also joining us is a very special guest, Debi McMullen. Debi was a juror on Judge Hastings' criminal trial here in Miami, and she is also a private investigator.
>
> Debi McMullen. Yes.
>
> Clark. Also joining us is Lou Salome who is the editor of the Miami News editorial page.
>
> Lou Salome. That's right, Bret.
>
> Clark. Are you going to ask for a trial before the full Senate?
>
> Hastings. We have already asked, and we will continue to do so. I think the Constitution pretty much mandates two things. The Senate has the power to make its own rules. There's no question about that. But the Constitution seems to discuss impeachment in the light that I think the dignity and grace of it requires, and decency requires, and that is as something extraordinary. And even though it is cumbersome and burdensome, I think it is the responsibility of the full United States Senate to sit as jurors the same as Ms. McMullen's full twelve jurors had the full responsibility. Absent that, I think it would have been atrocious had she been among three jurors to hear, see, and determine evidence, and then discuss it with the other nine. Liken it to that, and I believe that the full Senate should sit.
>
> Clark. There has been a lot of discussion, back and forth, about double jeopardy, and the argument is made the issue of double jeopardy does not apply because we are talking about a judge and whether he has the right to continue being a judge and not whether his case was resolved favorably to him, which it was, in the criminal courts. Do you have a response to that?

Hastings. What we have in this particular case is a case of first impression. Never before has an acquitted judge been confronted with virtually the same matters in the impeachment forum. So to answer your question, I borrow from James Kilpatrick. It's double jeopardy in fact, if it's not double jeopardy in law.

Clark. I am going to go to Mr. Salome in a minute, but I want to ask you one more question, and that is Judge Claiborne . . . in that trial, he did not get all 100 Senators.

Hastings. No, he did not. Along comes Judge Claiborne, and they decide, "Hey, you know twelve of us can hear this evidence and report to the others." Well, Senator Heflin from Alabama said that there were at least thirty-five Senators, when they voted to remove that man, who did not know one thing at all about what had gone on. Now that is wrong. But what happened in Claiborne's case—it was no presumption—what was happening is the machinery was being oiled for Al Hastings. That is what was happening in the Claiborne case.

Clark. Mr. Salome, do you have a response to some of the things the judge has to say?

Salome. It's not a matter of a response. I think it is a matter of a comment. I think that the Senate, in this case the entire Senate, should hear this case. No question about it. I do not think it is fair to take a committee of twelve and to go through the exercise that the Senate went through with Judge Claiborne. I think that was a different case because of the conviction. I think you could get away with it then. At the same time, I do not think you can get away with it in this case. I do not think the Senate should try.

And also I think that the law, the Constitution, ought to be changed because the Senate really cannot function as a committee of the whole and conduct this kind or any kind of an impeachment trial. It is impossible in this day and age. At the time the Constitution was written, the Senate could take a month, a month-and-a-half, and conduct this kind of a trial and not really miss out on a lot of other business. It is not possible today. So you have got to go, perhaps, to a committee system, but it has got to be done with a constitutional amendment, and it cannot be done in time for Judge Hastings' trial. So, the alternative, in my opinion, is to do it right and do it fairly, and to do it, the whole Senate must do it, no matter what it takes.

Clark. What about the issue of double jeopardy? It may be legally in doubt as to whether that applies or not, but you have a juror sitting here who went through a trial, seventeen days of a trial, and now you have another trial. They are just sort of saying, "Well, the jurors are wrong; they do not know what they are talking about."

Salome. This is where the whole matter gets a lot more complicated than just talking about the Senate. I think, if I were a juror, as Debi was, or if I were the judge, I would feel the same way—that it is double jeopardy. But looking at it as more of a disinterested observer, I would say that technically it is not, but in a practical sense it has that effect. I think that the impeachment standard is different from the trial standard, the criminal standard. There is no question about that.

The form that this whole proceeding has taken, the manner in which it was evolved from the acquittal right on to where we are today, in fact from the investigation right on to where we are today, is a very troubling thing to me. You know you could recite the whole case, and I am sure the judge could do it better than I. The manner in which the case was pursued in an investigative fashion, with the money not being allowed to go as far as it might have gone to be absolutely sure that there was a bribery conspiracy taking place—the explanation that I read about why that did not occur is not satisfactory to me.

Judge Hastings' career on the bench as somewhat of an adversary to the government in certain types of cases at the time, or just before, the investigation was started—all is troubling. The persistence and the singlemindedness of the judiciary and the investigators they hired and so on to take this case all the way to where it has gone today—it bothers me. The form is very much a part of the substance of the case, and yet they are separate. That makes it very, very difficult to come to a judgment that you really feel comfortable with.

CLARK. Do you think that maybe some of these judges think that the Judge is a little too outspoken? That maybe his demeanor does not befit another federal judge?

SALOME. I do not think you can say that of everybody involved in this case. I cannot say it because I do not know for one thing. But I would feel that, people being people, there has to be a good deal of resentment toward Judge Hastings for the way he conducts his court, for the kind of a person that he is outside the court. Speaking to groups, commenting on social issues and in the process, alluding to, implicitly commenting on, political issues because it is hard to separate social from political—I think all that makes the judiciary as a rule very uncomfortable with him, and I think that is a factor in it.

CLARK. Debi, how do you feel as a juror, seeing and watching on T.V., the man that you acquitted being put to the grinder again and being retried. Do you think that is fair?

MCMULLEN. No, it is not fair, like you were saying. We came to a decision, and we were a very good jury. We were sequestered. We did not have anything to do, except think about this case. We even went in on Saturdays for half a day. We could not see our families, nothing. We did everything by the book: We did not talk about the case until deliberations—right down the line.

We came to a decision, it was the only decision that could have come to pass because the prosecution did not have enough evidence. So, we gave that decision, and then a few weeks later I hear that a bunch of judges are going to start these impeachment proceedings. That is not fair. Maybe they do not like him for something, and a lot of stuff did come out about how he had run his court and everything. I thought maybe they were a little embarrassed about that—you know, that he relies on his law clerks. The prosecution tried to ridicule him for that.

Clark. In the trial, they tried to ridicule him . . . for making what really is an honest statement about the way judges, who obviously do not have time, do everything?

McMullen. Right, right. Then suddenly this came to pass. I could not believe it, and that it has gotten this far has surprised me. I thought eventually, maybe the judges' motion would not go through. But it just keeps going; it keeps getting worse and worse. Why did I waste my time.

Clark. I want to get back to something that is overlooked a lot when we discuss this case, and that is the facts. Are you guilty or are you not guilty?

Hastings. Absolutely not. I think that my best judge of that is sitting here.

I did not take the witness stand and fail to point out those things that I thought were weaknesses. I went to dinner. I went to Washington. I made phone calls. I might add the only thing different—and I want her to be comfortable about this—the only thing different is that I made a mistake during the course of that trial about four telephone calls. That is the only thing different at this point.

But what Ms. McMullen heard as a juror, the prosecutor either had what the Congress has or did use everything. You ask her. He argued to her that the letters were fabricated. He argued to her that I came home because I was trying to get away from the FBI. He argued to her, as a matter of fact, about the phone calls. He argued to her that I did not make certain phone calls. He argued to her that I went to the Fontainebleau as a show up with Bill Borders, and if I am mistaken ask her. She is sitting right here.

Clark. Let's do that. When you were sitting there and looking at the facts and you heard the lawyers giving their arguments, was there a struggle going on there, and people saying, "He is guilty; he must be guilty for them to bring charges." What was going on in the jury?

McMullen. Well, nothing went on until deliberations because we were not allowed to discuss the case.

Clark. Okay.

McMullen. During the course of the trial, you did get kind of swayed, back and forth, between. Then you finally got all the evidence. By the time we got all the evidence, it was three weeks into it. We were trying to recall what happened at the beginning of the trial, so that is why it took us so long.

We had to review some testimony, and we did, kind of, pick over his testimony quite a lot. We tried to see if there was—because, if you catch somebody in one lie, you can assume that they are lying through the whole thing. We picked it apart, and we could not find anything that proved to us. We even, at one point, called one of his law clerk's testimony up because he was saying that there was a telephone call. She said there was a telephone call. The government said there was not a telephone call. And so we pulled that up to verify, and we said, "Well, she says there was one; she's got no reason to lie." And we finally came to the conclusion that this was not enough evidence to convict anybody of anything.

Clark. But was it a question of a very strict legal standard? "The judge instructed us, and it is very strict, and you can't find him guilty unless you meet this strict standard," and you just felt that there wasn't enough evidence to meet that standard. Or, in your hearts, were you convinced that there just was not really anything to it?

McMullen. I cannot speak for everybody else, but I know some of us felt that there was—I mean, we are not even talking reasonable doubt, we are talking a lot of doubt.

Clark. A lot of doubt. Out of all the people in the universe, you are one of the very select few that really saw all the evidence and that can comment fairly because you have no ties to Judge Hastings or anything else. What really is there? What is the government's case? What do they have?

McMullen. Circumstantial evidence that was shaky at best and an investigation that did not finish; it never got to where it was supposed to go.

Clark. Explain that for the audience, because a lot of people were talking about the airport and what happened there, but some people——

McMullen. Well, that was not even in the part that I am talking about. I am talking about the fact that the person, the ex-FBI agent that they set up to do this little bribe, to deal with Mr. Borders—instead of wiring him to do the transaction, they wired his room. Then Bill Borders said, "Let's go for a ride." They everybody panicked, and it all quit right then.

Clark. And then they terminated the investigation.

Salome. If you are trying to convict a federal judge, I think you have an obligation to not worry about whether you are going to lose $150,000 or whatever. You go, and you do it. They do it with a lot less important matters than that.

Hastings. . . . Now what gives Congress the right to think that they are any better prepared than Ms. McMullen, who saw and heard it all. The big question becomes, whenever they hold the Senate trial, how can I reconstruct the events that she saw? And how fair is it, if I cannot reconstruct it? You want to know something? Some of the witnesses are dead already. The Romano brothers are dead. My uncle, who is a crucial witness, is dead in this particular matter. It is just not right. I will take her verdict and be satisfied. If we want to have the American people have trust in the cornerstone of justice, the jury system, I suspect that that is the best approach.

CLARK. We have about ten seconds left, Debi. Do you have a last word?

MCMULLEN. Well, this might be a bizarre comparison, but to me you have somebody who got acquitted and now they are being persecuted again. You know the system is working against them.

CLARK. Something's wrong. Thank you very much. Thank you for being here.

Mr. Chairman and members of the Committee, I thank you for letting me be here. When I finish, the managers will know, I will know, you will know, and all who care will know that you have heard me and that you have seen me. You will have heard me tell what I think fairness to Judge Hastings requires and why. You will have had the opportunity to confront me. Through your questions, you will have had the opportunity to cross-examine me in order to resolve any ambiguities in my testimony or prior memoranda that may concern you. You will have had the opportunity to test the quality of my statements and, more important, to plumb the depth and test the sincerity of my conviction.

When that process is done, every member present will be in a better position to participate in the debate that should follow and to pass judgment on the issues before you. Your position will be better because the House will know you have heard its managers' views directly, not filtered through staff, not through mere written summaries. The judge will know that you have heard me. But most important, citizens who care will have seen those they elected to do the job, doing some part of the job. Neither they nor we can doubt the heavy reliance you have placed and will place upon your staffs in this process, but they and we will know you heard and saw before you decided. That may suffice for this day, for you are not sitting in the trial of this impeachment. But the Constitution and a Senator's solemn oath will require more, far more than that, if the trial of this impeachment is to do impartial justice.

If there is to be a trial of Alcee L. Hastings, we ask that every member of the Senate who would be present on the day of judgment also be present:

To hear the opening statements, so that the managers and counsel for the judge may preview and structure the evidence in order that the jurors may better understand and evaluate the evidence as it is presented;

To hear and see the witnesses as they testify, to hear and see all the witnesses;

To observe them when they are confronted;

To evaluate the quality of their recollections, the conviction with which they are held, and the sincerity with which they are expressed;

To see the other evidence in the context in which it is presented, and to hear the witnesses through whom it is presented.

If there is to be a trial, a trial that is fair, every Senator must do what Debi McMullen and her fellow jurors did.

A stale printed record can only be a transcription of words that were said, but not heard, with separate volumes of exhibits, neatly bound, but far separated from testimony through which they were presented. That will not do in this case. It will not do at all. If there is to be a trial at all, it must be trial by the Senate, the full Senate: If the trial is to be fair.

Mr. Chairman and members of the Committee, I return to where I started: The three additional truths I mentioned must also be recognized, if the trial of this impeachment is to do, and to be seen to do, impartial justice to Alcee L. Hastings.

First: The managers have submitted a last-minute proposal to further dilute the protections traditionally accorded the accused in the trial of an impeachment. Their staff has prepared voluminous proposed stipulations drawn from the Statement of Information their staff prepared before the House conducted its hearings. The managers now suggest that the burden be shifted to Judge Hastings, before the trial begins, to show what basis he has to refute their staff's claims. That will not do.

The House had its opportunity to formulate the accusations in such detail as it chose in the Articles of Impeachment. Judge Hastings has responded. The managers have replied. The facts in dispute are now defined. The managers must now recognize that they, not their staff, must carry the full burden the House assumed. They must make good the accusations by presenting competent testimony and other evidence. When they rest, then and only then may Judge Hastings be called upon to decide whether and what competent evidence should be produced in his defense.

That was the burden the prosecutors assumed the last time these accusations were tried. That is the procedure that was followed. Debi McMullen and eleven other citizens became constitutional officers and took an oath to do impartial justice there. They did. The House has already enjoyed unprecedented advantage in conducting a reinvestigation. The suggestion that they should be permitted to avoid their responsibility and dilute the accused's rights further is wrong.

If there is to be a trial, the managers must again assume the burdens the prosecutors assumed in 1983, the burden that managers for the House have assumed in trials of impeachment throughout history. If there is to be a trial, Judge Hastings must be accorded at least those protections that he was accorded in 1983 and the protections that have been accorded the accused in trials of impeachment throughout history. If there is to be a trial, the Senators must execute their oaths as fully as did Debi McMullen and her fellow jurors in 1983 and as fully as have Senators in trials of impeachment throughout history.

Second: The managers have maintained throughout that the House holds monopoly power over the evidence they received from other branches as well as that gathered by its staff. The managers have recently asserted that they may use the House's subpoena power to enable their staff to conduct continuing *ex parte* inquiries and depositions, without notice to the accused, in order to gather additional evidence in preparation for trial. In the managers' view, the right of an accused official to be informed of the evidence is a matter that the constitution leaves to the mercy of his accuser. That is wrong.

If there is to be a trial, a trial that is fair, Judge Hastings must be given access to the full deck. He must and his counsel must be given time to analyse and evaluate the materials that the managers have received, gathered, analyzed, and evaluated over a period of almost two years, but have withheld from him to this date. He must be given access to the Senate's subpoena power before trial to gather such additional evidence as may remain and be necessary for his defense. That is necessary to assure a trial that is orderly as well as fair.

Third: If the trial of this impeachment is to be fair, the Senate must provide funds for the defense. The Constitution guarantees that a judge's compensation in office may not be diminished. Whether that guarantee requires that funds be provided to pay for the defense that produced Judge Hastings' acquittal in 1983 is not before you. Whether that guarantee requires that funds be provided to pay for costs and liabilities that Judge Hastings has been forced to bear over the six succeeding years is not before you.

What is before you is the fact that for seven years officials in all three branches have taken actions that have diminished Judge Hastings' compensation in office and that have imposed annual liabilities far in excess of that compensation. What is before you is the fact that the House demands that Judge Hastings be tried a second time on accusations a jury rejected. If the principles of double jeopardy, speedy trial, and fundamental fairness do not preclude a second trial of an accused judge, then surely principles of decency and fairness, as well as those embodied in the Compensation Clause, require that funds be provided for the defense of an acquitted judge who is called upon to defend himself at a second trial. Funds must be provided for the defense in the trial of this impeachment, if the trial is to be fair.

Mr. Chairman and members of the Committee, the late General MacArthur said it best in his farewell address. He said it so simply that my children, your children, our fellow citizens, you and I—all can understand: "Duty, Honor, Country." The Constitution imposes the duty upon every Senator—be fair and do impartial justice. The honor of every Senator was pledged as each took the oath to do impartial justice in *all things appertaining to the trial of this impeachment*. I ask this Committee to recommend procedures for the trial of this impeachment that comport with that duty; procedures that will enable each Senator to redeem the honor pledged, and so to maintain the tradition of an honorable Senate, a tradition built over 200 years. I ask this not just in the name of Alcee L. Hastings; I ask it also in the name of our country.

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